SUPREME COURT, U. S.

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No. 73-1486

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

JOSEPH YUKI SOTOMURA and
GRACE FUMIYE SOTOMURA, *Petitioners*,

v.

COUNTY OF HAWAII, ET AL., *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF HAWAII

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IN THE

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OCTOBER TERM, 1973

No. 73-

JOSEPH YUKI SOTOMURA and
GRACE FUMIYE SOTOMURA, *Petitioners,*

v.

COUNTY OF HAWAII, ET AL., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF HAWAII

Petitioners JOSEPH YUKI SOTOMURA and GRACE FUMIYE SOTOMURA, pray that a Writ of Certiorari issue to review the Judgment of the Supreme Court of the State of Hawaii entered in this cause on January 7, 1974.[1]

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[1] In addition to County of Hawaii, Respondents are Robert Mitsugi Yamada, Emma Laeha Yamada, Donald Kalanioupuu Yamada, members of Yamada Estates, a duly registered general partnership in the State of Hawaii, Ermardine Kuulaimomi Yamada, Leo George Lycurgus, Georgina Cooper Lycurgus and Nicholas Lycurgus, whose property interests are detailed in the trial court's findings of fact, App. 1-2, and conclusions of law, App. 5.

OPINION BELOW

The opinion of the Supreme Court of the State of Hawaii ("the court below") is reported, with dissenting opinion, at 55 Haw. —, 517, P.2d 57 (1973). (App. 8). The Third Circuit Court of the State of Hawaii ("the trial court") did not issue an opinion. The trial court's findings of fact and conclusions of law, and also its judgment, appear in the Appendix at pages 1 and 7.

JURISDICTION

The judgment of the court below (App. 30) was entered January 7, 1974, following the denial on December 28, 1973 (App. 29) of a petition for rehearing (App. 22). This Court's jurisdiction is invoked under 28 U.S.C. Section 1257(3).

QUESTIONS PRESENTED

1. Whether, on Petitioners' appeal from a trial court's award of compensation in an eminent domain action to take land to which Petitioners held registered title, the court below effected a taking of property without just compensation and deprived Petitioners of due process of law by an unpredictable ruling that the State, not Petitioners, was the owner of a portion of the land condemned and that compensation need not be paid Petitioners for that land.

2. Whether announcement by the court below of a novel method to re-establish seashore boundaries of land registered in the Torrens title system of the state, use of that method to direct the relocation of Petitioners' seashore boundary to a position inland from that at which it was fixed by the Torrens title system,

and declaration that all of Petitioners' land seaward of the new boundary so fixed is state-owned, without (a) adhering to statutory procedures for establishing boundaries in the Torrens title system and (b) affording Petitioners the opportunity to be heard and to present evidence, constituted a taking of property without compensation and a denial of due process of law.

3. Whether the failure of the court below to give effect to a final judgment of the state's land court, which supervises the state's Torrens title system, when the provisions of that judgment conflict with the appellate court's interpretation of public policy, constituted a denial of due process of law.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States:

> Amendment V
>
> No person shall . . . be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.
>
> Amendment XIV, Section 1
>
> No state shall . . . deprive any person of life, liberty, or property, without due process of law . . .

Hawaii Revised Statutes ("HRS") Chapter 501, Land Court Registration, sections 501-1, 501-28, 501-45, 501-51, 501-71, 501-74, 501-75, 501-81, 501-82, 501-85, 501-87, 501-88, 501-186, Vol. 7 at pages 4-41, and Vol. 7 (Supp. 1973) at pages 2-10. Each section is reproduced in full in the Appendix (App. 33-38).

STATEMENT OF THE CASE

In July, 1970 the County of Hawaii [2] commenced an eminent domain action to acquire Petitioners' seashore land for public use as a beach park. The land was described in the Complaint (Rec. Doc. 1) [3] as "All of Lot 3, Land Court Application 1814, as shown on Map 1". As shown by Map 1 (Rec. Doc. 33), Lot 3 is shorefront land, bounded inland by a road and seaward by a meander line "along highwater mark", having an area of 5.314 acres. Petitioners' predecessors registered this land in the Land Court of the State of Hawaii ("the land court") in 1962 and obtained a Decree of Registration and Owner's Certificate of Title.[4] At the time of registration, the boundaries of the land were fixed, with the approval of the state

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[2] A municipal corporation encompassing all of the Island of Hawaii.

[3] The record transmitted to the Clerk of this Court consists of copies of original documents. The pages of this record are not consecutively numbered, but each document is numbered at the lower left hand corner of the first page. References herein to documents in the Record (Rec. Doc. ——) are to those numbers.

[4] See notation of Registrar of the Land Court on Map 1, Rec. Doc. 33. The Torrens title system of the state is under the judicial supervision of the land court. The land court has exclusive original jurisdiction of all applications for registration of title to land and all questions under the statutes governing registered land. Section 501-1, HRS (App. 33). A decree of registration conclusively quiets title, subject only to certain statutory exceptions not applicable here. Secs. 501-71 and 501-82 HRS (App. 35-37). The certificate of registration, which must include a description of the land, is conclusive evidence of all it contains. Secs. 501-74, 501-75 and 501-88, HRS (App. 35, 36, 38). Land Title, Bishop Trust, 35 Haw. 816 (1941); Akagi 1, Oshita, 33 Haw. 343 (1935); In re Rosenbledt, 24 Haw. 298 (1918), *modified on other grounds*, 25 Haw. 561 (1920); *Paahoa* v. *Swinton*, 20 Haw. 355 (1911). As used in this Petition, the term "registered land" means land registered in the land court, as distinguished from land not registered and identified as "unregistered land."

surveyor, by decree of the land court.[5] In accordance with established practice, the location of high-water mark was fixed along the seaweed line, that is, the growth of seaweed along the seashore, close to the water.[6] The judgment (Decree of Registration) of the land court was a decree in rem, binding upon the land, upon the state and upon all the world.[7]

A few days before trial, the County filed a memorandum suggesting erosion of Petitioners' land had reduced the size of Lot 3 from 5.314 acres to 4.201 acres (Rec. Doc. 8). Defendants filed memoranda (Rec. Docs. 9 and 10) asserting, *inter alia*, that the original certificate of title issued by the land court was conclusive as to the boundaries and size of Lot 3, that there had been no erosion and that the decree of registration was res judicata as to the means of locating high-water mark as the boundary.

During trial there was but passing mention of erosion in the testimony; however, the judge took a few minutes to visit the property (Rec. Doc. 20, pp. 161-2). His findings of fact included a finding that there had been erosion to the land (App. 2, paragraph 6). As the measure of the extent of erosion, the trial court adopted

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[5] See notation on Map 1, Rec. Doc. 33, and sections 501-28, 501-45 and 501-51, HRS (App. 35, 34).

[6] Rec. Doc. 20, pp. 126-133, 154. The seaweed or *limu* line is at an elevation just above mean high tide and is very well defined by growth of seaweed on the rocks within the reach of the waves. Rec. Doc. 20, pp. 144-145. "*Limu*" is the Hawaiian word for seaweed. Other Hawaiian words in common use to indicate direction were employed by the witnesses, counsel, the trial court and the court below. *Mauka* means toward the mountains, inland. *Makai* means toward the sea, seaward.

[7] Sections 501-1 and 501-71, HRS (App. 33, 35). As to land registered while Hawaii was a Territory, even if the United States is bound. United States v. Fullard-Leo, 156 F.2d 756 (9th Cir. 1946), *aff'd*, 331 U.S. 256 (1947).

a criterion for locating the seaward boundary of unregistered land that had been suggested by the court below in recent case;[8] that is, the upper reaches of the wash of the waves as evidenced by the line of debris.[9] This same line was employed by the trial court in separating Lot 3 into two parcels for valuation purposes.[10]

It is important to note that this separation was only for purposes of assessing the compensation to be paid Petitioners for the taking of the whole Lot 3. The trial court did not rule that Petitioners no longer had title to the eroded portion nor did it relocate the seaward boundary of Lot 3. The judgment decreed the taking "all of Lot 3, Land Court Application 1814 . . . , 5.314 acres" (App. 6, paragraph 2) and made an award of compensation for the entire lot. The compensation awarded for the portion of Lot 3 seaward of the debris line was $1.00; inland from that line the compensation was $1.20 per square foot, exceeding $200,000 in the aggregate.

Petitioners' appeal to the court below claimed error in the assessment of compensation. The principal points were that the seaward boundary was conclusively fixed by the land court judgment, the *Ashford*[11] case had no application to registered land, division of

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[8] In Re Application of Ashford, 50 Haw. 314, 440 P.2d 76 (1968), hereinafter cited as *Ashford*.

[9] This line, called County Highwater Line on Defendant's Exhibit 3 (Rec. Doc. 31), was inland from Petitioners' seaward boundary, called Ld. Ct. Highwater Line on that exhibit. That exhibit also shows the vegetation line, hereinafter mentioned, inland from both other lines.

[10] App. 2-4, Findings of Fact Nos. 6, 7 and 8.

[11] Cited *supra*, note 8.

Lot 3 into two parcels for valuation purposes was improper, and the trial court erred in refusing to consider conjunctive use of Lot 3 with nearby land owned by Petitioners.

The court below ruled the trial court was correct in relocating the new boundary of Petitioners' land, following erosion, through use of the criterion announced in *Ashford*.[12] The court below went far beyond the judgment of the trial court, however, and held that Petitioners had lost title to a portion of Lot 3 by erosion, that their new seaward boundary should be established at the vegetation line,[13] that they were not entitled to compensation for the land seaward of the vegetation line and that on remand the trial court should establish the precise location of the vegetation line and reduce the compensation payable to Petitioners accordingly.

By this ruling, it was decided for the first time in Hawaii that title to registered land could be lost by erosion.[14] The startling and wholly unpredictable aspects of the ruling, however, were that after erosion the seaward boundary should be located at the vegetation line, irrespective of the fact that a different line was used in registering the land, and that a court other than the land court has power to adjudicate the location of the boundaries of registered land.

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[12] This was a mistaken characterization of the findings and judgment of the trial court, as is evident from a careful reading of those documents.

[13] See note 9, *supra*.

[14] See In re Application of Castle, 54 Haw. 276, 280; 506 P.2d 1, 4 (1973). Petitioners do not dispute this ruling; loss of title through erosion of land by natural forces is not at issue here.

HOW THE FEDERAL QUESTIONS WERE RAISED

The Federal questions presented herein were raised at the earliest opportunity on December 21, 1973, by a timely petition for rehearing (App. 22). Only upon issuance of the lower court's opinion on December 11, 1973 did it become known that the lower court had granted to the State of Hawaii title to approximately 2 acres of Petitioners' land, including nearly 1 acre for which the trial court had awarded compensation of $1.20 per square foot.[15] In their petition for rehearing, Petitioners specifically contended that the redefinition of high-water mark, by which their seaward boundary is fixed, effected a taking without just compensation in violation of the Fifth and Fourteenth Amendments to the Constitution, and that they were denied their constitutional right to a hearing and presentation of evidence regarding that taking. The petition was denied without argument, evidence or opinion on December 28, 1973, one justice dissenting (App. 29).

REASONS FOR GRANTING THE WRIT

Introduction

At issue in this case is the right of a state court, by redefinition of the term "high-water mark", to relocate shorefront boundaries such that state property is enlarged, and private property diminished, without paying compensation to any owner for the lost property, without hearing, argument or evidence and in total disregard of statutes governing registered land. If allowed to stand, this decision will have summarily and unpredictably enlarged state ownership along 135 miles

[15] The area of land between the land court boundary and the debris line (Lot 3B, for which the trial court awarded $1.00) was 1.120 acres. The exact area between the debris line and the vegetation line has not been determined, but appears from Defendants' Exhibit 3 (Rec. Doc. 34) to be approximately 1 acre.

of Federal and privately owned sandy shoreline in Hawaii, upon which the vegetation line now evidences the new high-water mark. The same may also be true of hundreds of miles of the remaining 530 miles of Federal and privately owned shoreline not classified as sandy and upon which there may or may not be a vegetation line to evidence the new high-water mark.[16]

This case involves a retroactive alteration of state law that effects an unconstitutional taking of property without compensation. It presents the same constitutional issues raised by appellants and petitioners in cases numbered 73-1440, 73-1441 and 73-1442 recently filed in this Court.[17] The court below, in those cases, declared private water rights to be state owned without affording the owners an opportunity to be heard and without making provision for compensation to be paid.

This Court Has Jurisdiction To Issue a Writ of Certiorari in This Case

The judgment of the court below is a final judgment and the Federal questions were raised at the earliest opportunity.

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[16] Statistics taken from Hawaii Regional Inventory of the National Shoreline Study, Corps of Engineers, 1971. Some insight into the magnitude of the economic impact of this expropriation of private property is revealed in the comment in that Study, at page 5:

> "The relatively stable situation surrounding shoreline land ownership is attributed to the tremendous demand for the islands' limited beach frontages, particularly sandy beaches, which has in effect discouraged sale of these valuable lands."

[17] These cases, respectively, are entitled:

McBryde Sugar Company, Limited, and Olokele Sugar Company, Limited vs. State of Hawaii, et al.

Selwyn A. Robinson, et al. vs. State of Hawaii, et al.

Ida Albarado, et al. vs. State of Hawaii, et al.

The court below remanded the case to the trial court with instructions to relocate Petitioners' seaward boundary along the vegetation line and to recalculate the amount of compensation to be paid, based on the revised land area. The recalculation is purely mathematical since the unit price per square foot has been finally adjudicated. The relocation of the seaward boundary is merely ministerial. The location of the vegetation line has been mapped (Defendants' Exhibit 3, Rec. Doc. 34), so the trial court will merely call for a survey description of that location and a calculation of the area of Lot 3 remaining inland from that line. When action to be taken in compliance with a judgment is ministerial only, the judgment is final. *Construction Laborer's Local 438* v. *Curry*, 371 U.S. 542 (1963); *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 123-27 (1945); *Cole* v. *Violette*, 319 U.S. 581 (1943).

No Federal question was raised until the court below unexpectedly and *sua sponte* announced a new and unanticipated rule of law by declaring the vegetation line to be the boundary of all privately owned property along shores where the wash of the waves is evidenced by both a debris line and a vegetation line further inland, including property registered under the Torrens system and guaranteed by the full faith and credit of the state.

Where Federal questions first arise in an unanticipated ruling of the State's highest court, presentation of those questions in a timely petition for rehearing is adequate to invest this Court with jurisdiction of the case on writ of certiorari. *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673 (1930); *Missouri ex rel Missouri Insurance Co.* v. *Gehner*, 281 U.S. 313 (1930). *See also, Herndon* v. *Georgia*, 295 U.S. 441 (1935).

Petitioners had no forewarning that the court below intended to take their property without compensation nor any reason to expect that the court would adopt the vegetation line, or any criterion other than that used in the registration proceedings, to define the location of the high-water mark to which their title extends. Until *Ashford,* seashore boundaries along high-water mark had traditionally been set at the limu line or at mean high water.[18] The *Ashford* decision involved a particular parcel of unregistered land with a boundary "ma ke kai",[19] as distinguished from registered land with an adjudicated boundary "along high-water mark" that had been established, in accordance with custom, along the seaweed line. Even assuming the applicability of *Ashford* to registered land, there had been neither suggestion nor argument in the trial court or the court below that the seaweed boundary of Petitioners' property should be moved all the way inland to the vegetation line or that Petitioners should be uncompensated for property diminished by a judicial change of the criterion used to locate the seaward boundary. The decision of the court below overturned many years of established practice, history, and precedent in an opinion not foreshadowed by previous cases.

The Taking of Property Without Compensation Deprived Petitioners of Due Process of Law

This Court ruled more than 78 years ago that the Fifth and Fourteenth Amendments preclude states

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[18] Rec. Doc. 20, pp. 127, 133, 143-45. Opinions of the Attorney General of Hawaii, Nos. 1589 (September 1, 1932) and 1644 (September 23, 1936). See, *e.g.*, decisions of the land court judge in Land Court Applications Nos. 616 and 1225.

[19] This was the monument called for on the seaward boundary of a parcel to which private title had been acquired by a Royal Patent Grant by the Kingdom of Hawaii. It was translated as "along the sea."

from taking private property without compensation. *Chicago, Burlington and Quincy Railroad Co.* v. *Chicago*, 166 U.S. 226 (1897). There can be no question, in view of prior decisions of this Court, that the action of the court below was state action. *Shelly* v. *Kraemer*, 334 U.S. 1, 14-18 (1948); *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673, 680 (1930); *Saunders* v. *Shaw*, 244 U.S. 317 (1917).

The taking of Petitioners' property by the court below was effected through redefinition of the term "high-water mark". The trial court's finding of erosion enabled the court below to examine the question whether registered land is subject to erosion. It held, by interpretation of section 501-81 HRS (App. 36), that it is. Using that ruling as a springboard, the court below hurdled the procedural and jurisdictional requirements of statutes governing registered land and held that the State, not Petitioners, was the owner of all land seaward of a new high-water mark announced as controlling the seaward boundaries of all lands on shores where the wash of the waves is evidenced by both a debris line and a vegetation line. Imposition of this new standard upon Petitioners denied them the protection they were entitled to expect was afforded them by statutes governing registered land. These include provisions for adjudication by the land court of adverse claims to registered land [20] and approval by the land court of subdivisions and consolidations of registered land, involving boundary changes.[21] Absent this change in the criterion to be used in locating high-water mark, Petitioners would not have lost title to any, or at

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[20] Sec. 501-186, HRS (App. 38).

[21] Sec. 501-85, HRS (App. 38).

least very little, land as is evident from examination of the maps received in evidence by the trial court.[22]

The court below justified its adoption of a new high-water mark with the astonishing statement:

> "The *Ashford* decision was a judicial recognition of long-standing public use of Hawaii's beaches to an easily recognizable boundary that has ripened into a customary right. *Cf. State ex rel. Thornton v. Hay*, 254 Or. 584, 462 P.2d 671 (1969). Public policy, as interpreted by this court, favors extending to public use and ownership as much of Hawaii's shoreline as is reasonably possible." (App. 13)

No interpretation of public policy could afford legal grounds for the summary deprivation of Petitoners' property effected by the ruling of the court below.[23] In any event, whatever customary rights might attach to unregistered land could not attach to land registered free and clear of those rights because rights in registered land cannot be acquired by prescription or adverse possession. Sec. 501-87, HRS (App. 38). The decision of the court below made a mockery of the sanctity of Petitioners' Torrens title and now threatens all such titles in the State.

It is important to note that the relocation of Petitioners' seaward boundary directed by the court below does not involve merely a mechanical movement of that boundary to follow natural erosion. The court

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[22] Defendants' Exhibits 1 and 3 (Rec. Does. 33 and 34) and Plaintiff's Exhibit 2 (Rec. Doc. 32). The State of Hawaii was not a party to the proceedings in the trial court or the court below and has never asserted title to the portion of petitioners' land that the court below bestowed upon it.

[23] It is also noteworthy that the *Ashford* decision was founded upon evidence excluded by the trial court, but relied on by the appellate court to reach its conclusion. 50 Haw. 314, 315.

below took advantage of the fact of erosion to redefine high water mark, such that all seaward boundaries will be moved further inland than if located by the criteria formerly used.[24] This is not erosion by the sea, but by judicial decree. Under the new definitions, all shoreline owners will lose more to erosion and gain less by accretion than under prior property law. If the state wishes to expand its ownership inland along the shoreline it should pay for the property taken.

Justice Stewart's concurring opinion in *Hughes* v. *Washington*, 389 U.S. 290 (1967), speaks squarely to the constitutional protection Petitioners beseech this Court to grant them. In *Hughes*, the Washington Supreme Court abruptly overturned state law by ruling that title to accretion upon seafront property vested in the state. The Court based its decision upon a new construction of the state constitution. As a result, appellant Hughes lost a substantial amount of beachfront property. A majority of this Court held that federal law applied and reversed the state court. Mr. Justice Stewart, concurring, asserted that if state law applied, the decision of the state court effected an unconstitutional taking:

> "There can be little doubt about the impact of that change upon Mrs. Hughes: The beach she had every reason to regard as hers was declared by the state court to be in the public domain. Of course

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[24] Compare In Re Application of Castle, 54 Haw. 276, 506 P.2d 1 (1973), the next most recent Hawaii case involving shoreline boundaries, in which the dissenting justices stated:

> "Here, contra to the record on appeal, the majority of the Court is changing, creating and inserting new facts; changing, drafting and inserting new pleadings all in the guise of a procedural vehicle to effect changes in seashore boundaries to incorporate fluctuations of the high water mark." 54 H. at 286.

> the court did not conceive of this action as a taking. As is so often the case when a State exercises its power to make law, or to regulate, or to pursue a public project, pre-existing property interests were impaired here without any calculated decision to deprive anyone of what he once owned. But the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it does. Although the State in this case made no attempt to take the accreted lands by eminent domain, it achieved the same result by effecting a retroactive transformation of private into public property—without paying for the privilege of doing so. Because the Due Process Clause of the Fourteenth Amendment forbids such confiscation by a State, no less through its courts than through its legislature, and no less when a taking is unintended than when it is deliberate, I join in reversing the judgment." 389 U.S. at 297-98.

Mr. Justice Marshall, delivering the opinion of the Court, recently cited this language with approval in *Bonelli Cattle Co.* v. *Arizona*, 42 U.S.L.W. 4080 (U.S. Dec. 18, 1973). In that case the question was again raised, but not decided, whether the State's assertion of title in private property constituted a taking without compensation. The question was termed "a serious constitutional issue." (42 U.S.L.W. at 4085).

The Federal questions which the majority of this Court did not pass upon in *Hughes* and in *Bonelli* are now presented, and warrant review.

The Method of Taking Was Fundamentally Unfair

Any judicial transfer of title to private lands to the State which does not permit the owner an opportunity to be heard or to present evidence is not constitutionally valid. Whenever a party is to be deprived of property, he is entitled to a meaningful hearing

before the fact. *Fuentes* v. *Shevin*, 407 U.S. 67 (1973); *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673 (1930). *See also Eaton* v. *City of Tulsa*, No. 73-5925, decided March 25, 1974. *Fuentes* restated the basic reasons underlying the requirement of procedural due process:

> ". . . when a person has an opportunity to speak up in his defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented. It has long been recognized that fairness can rarely be obtained by secret, one-sided determination of fact decisive of rights . . ." Citing *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 170-172 (1951), (Frankfurter, J., concurring). 407 U.S. at 81.

In this case the trial court, while allowing only nominal damages for land seaward of the debris line, at least respected Petitioners' title. The lower court, however, without any claim to the land having been asserted by the state, nor any hearing on title or boundary location, decreed that all of Petitioners' property seaward of the vegetation line belonged to the public. The state's right to be heard upon a possible claim to title by erosion of registered land was protected in *In Re Application of Castle*, 54 Haw. 276, 506 P.2d 1 (1973). Surely the owner of the land has no less right than an adverse claimant to be heard.

The Refusal of the Lower Court To Give Res Judicata Effect to the Land Court Decree Deprived Petitioners of Due Process of Law

Normally, the application of res judicata is a matter of state law, resting largely within the discretion of the court. Petitioners submit, however, that a litigant has a right to rely upon the protection afforded by that

doctrine except in connection with exercise of recognized governmental prerogatives. To deprive Petitioners of that protection is to deprive them of due process of law. If for example, the taking of Petitioners' property in this instance had been accomplished through the exercise of a navigational servitude, to which even a registered title might be subject, then Petitioners should have no cause for complaint. In fact, however, the taking was accomplished in the implementation of a policy formulated by the court to extend public ownership of the shore. Even if it be conceded that the policy exists as public policy, is valid and should be promoted, this change, occurring subsequent to the registration of Petitioners' title and determination of the method by which Petitioners' seaward boundary is fixed, should not be permitted to derogate from Petitioners' adjudicated rights.

In *United States* v. *Moser*, 266 U.S. 236 (1924), the government argued res judicata should not apply to a Court of Claims award for service in the civil war because, subsequent to the award, the Court of Claims adopted a different construction of the statute authorizing service payments. The Court of Claims held res judicata applied, despite intervening changes of law, and declined to apply its new construction of the statute to later suits instituted by Moser to collect installments of pay. On appeal this Court concurred:

> ". . . a *fact, question* or *right* distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view or by an erroneous application of the law." 266 U.S. at 242. (Sutherland, J.)

Where the refusal of a state court to apply res judicata results in the direct, actual and irreparable loss of property, that refusal must be said to be so fundamentally unfair as to abridge Petitioners' constitutional right to due process of law.

CONCLUSION

There are 560 miles of privately owned shoreline and more than 100 miles of Federally owned shoreline in the State of Hawaii potentially affected by the lower court's ruling. The owners' rights stand to be adversely affected because the policy declared by the court below will dictate stare decisis application of this decision in future contests. The constitutional questions raised by this petition are of immediate and critical importance to the entire State of Hawaii. The writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

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APPENDIX

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

Civ. No. 2260

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on to be heard before the Honorable Nelson K. Doi, Judge of the Circuit Court of the Third Circuit, in a jury-waived trial on November 5, 1971, in Hilo, Hawaii.

On November 8, 1971, by stipulation of the parties, an on-site inspection was held in the presence of all the counsels, together with Mr. Kaloi, surveyor for the Plaintiff, and Mr. Smith and Mr. Murray, surveyors for the Defendants. The Court, having considered the evidence and records on file herein, finds the facts and conclusions of law are as follows:

FINDINGS OF FACT

1. That the Plaintiff is a municipal corporation, has power of eminent domain, and was properly authorized to commence this suit.

2. The expansion of the Kaimu Black Sand Beach Park in Kalapana, Puna, County and State of Hawaii, is a public use for which private property may be taken.

3. The expansion of the Kaimu Black Sand Beach Park requires the taking of all of Lot 3, Land Court Application 1814, as shown in Map 1, and evidenced in Owner's Certificate of Title No. 86867, 5.314 acres.

4. The quantum of land being taken is not excessive and is within the requirements of the public purpose.

5. The proprietary interests of the parties in the subject property are as follows:

Joseph Yuki Sotomura, husband of Grace Fumiye Sotomura, one-half (½) undivided interest.

The other one-half (½) undivided interest is owned by Yamada Estate, a general partnership whose partners are:

Robert Mitsugi Yamada
Emma Laeha Yamada (husband and wife)

Donald Kalaniopuu Yamada, whose wife is Ermardine Kunlaimomi Yamada.

The subject property is also subject to a mortgage dated September 1, 1969, filed in the Office of the Assistant Registrar of the Land Court of the State of Hawaii as Document No. 494556, wherein the mortgagees are Leo George Lycurgus, husband of Georgina Cooper Lycurgus, and Nicholas Lycurgus, single, as joint tenants.

6. That there has been erosion along the seaward boundary so that the seaward boundary, according to *In Re Application of Ashford*, 50 Haw. 314, 1968, would be further inland. The survey made by Mr. Kaloi properly indicates the point to which the work of the elements, waves, winds, has taken its toll to erode the land so that following the Ashford case "the upper reaches of the wash of waves as evidenced by the line of debris" would establish the metes and bounds description of the subject property remaining above the line established by the Ashford case, as evidenced in Exhibit 1 attached hereto and made a part hereof, and hereinafter referred to as Lot 3A. The acreage in Lot 3A is 4.194 or 182,691 square feet.

That portion of Lot 3, Land Court Application 1814 (5.314 acres), which was eroded and which is below the Ashford seaward boundary is described in metes and bounds as evidenced in Exhibit 2 attached hereto and made a part hereof, and hereinafter referred to as Lot 3B. The acreage in Lot 3B is 1.120 acres or 48,787 square feet.

Both Lot 3A and Lot 3B constitute the subject land, Lot 3, Land Court Application 1814, 5.314 acres.

7. The just compensation for the taking of a portion of the subject land below, makai, and seaward side of the Ashford seaward boundary, Lot 3B, and which amounts to 1.120 acres or 48,787 square feet is $1.00 for the total area. This Court finds and concludes that the area below the Ashford line has no market value, except for $1.00, and further because of the operation of the law in the Ashford case it has no value to the defendants.

8. The area remaining which is Lot 3A, and is a lot in itself, narrow, bounded by a road on the mauka side and by a rough coastline on the seaward side which is subjected to strong winds and high seas. The area is served by telephone and an 8-inch water main. There is no electricity, except that electricity is available up to the town of Pahoa. The County General Plan has designated the area as "park," the County zoning has assigned the area "open," and the State Land Use has placed the land under "conservation." The parcel is below and makai of the east rift zone which makes the parcel subject to inundation by lava flows and volcanic action. In the area from Pahoa going south and through and up to the National Park there are no big building investments requiring large sums of money. In the same area there are no resorts or hotels. The parcel is subject to shoreline setback as established by the State Land Use Commission and the County of Hawaii Planning Commission requiring a 40-foot setback. It is highly unlikely and very speculative that the subject parcel of land will be allowed by the Board of Land and Natural Resources to develop for resort and hotel purposes. It is very likely and reasonable to conclude that the Board of Land and Natural Resources will allow the subject parcel to be developed and used for public park purposes. This was reasonably clear at the time of the filing of the Complaint on July 7, 1970, and it was reasonably clear at the time of the establishment of the County General Plan in 1965 when the subject parcel was designated "park." The market data of sale of land in the area do not support the

conclusion that lands were being sold and bought for resort development. Some obviously were for speculation. The more reliable will indicate a figure very much less than that suggested by defendants. That the just compensation for the taking of that portion which is Lot 3A, 4.194 acres which is 182,691 square feet, is the sum of $1.20 per square foot or a sum of $219,229.20.

9. That there were no severance damages to the parcel owned by defendants mauka and across the road for the reasons that:

a) It is reasonable to conclude that a portion of the mauka parcel will be designated for public park and very, very unlikely and speculative that it would be developed for resort and hotel development within the reasonable future;

b) There is no allegation in any pleading that this is a question before the Court;

c) If there were any severance damages, the evidence does not support any clear amount.

10. The testimony of Mr. Bush deserves very little weight, if any, because he testified under two assumptions:

1) That the State will permit resort and hotel development in the area;

2) That if the State allowed same, there will be people who will invest their money.

There was no reliable evidence to support these two assumptions. The assumptions are based on speculation.

The testimony of Mr. Alexander can be written off on the same basis as Mr. Bush. Mr. Alexander had high credentials, but it was obvious to this Court that he testified with a strong bent to help his clients. His professional achievements impressed this Court, but his testimony, except for his analysis of the market data, in this

case can be given little weight. His analysis of the market data was given consideration.

CONCLUSIONS OF LAW

1. That the Plaintiff, County of Hawaii, has the power to take Lot 3, Land Court Application 1814, Owner's Certificate of Title No. 86867, 5.314 acres, in fee simple absolute, together with all improvements and appurtenances thereunto belonging, for use in the expansion of the Kaimu Black Sand Beach Park in Kalapana, Puna, County and State of Hawaii, pursuant to Chapter 101, HRS 1968, as amended;

2. That the Court has the power to determine all actions arising under Chapter 101, HRS 1968, as amended;

3. That there were no severance damages or any damage to the parcel owned by defendants mauka and across the road from the subject property;

4. That the proprietary interests of the parties in the subject parcel are as follows:

Joseph Yuki Sotomura, husband of Grace Fumiye Sotomura, one-half (½) undivided interest.

The other one-half (½) undivided interest is owned by Yamada Estate, a general partnership, whose partners are:

Robert Mitsugi Yamada ,
Emma Laeha Yamada (husband and wife)

Donald Kalaniopuu Yamada, whose wife is Ermardine Kuulaimomi Yamada.

The subject property is also subject to a mortgage dated September 1, 1969, filed in the Office of the Assistant Registrar of the Land Court of the State of Hawaii as Document No. 494556, wherein the mortgagees are Leo George Lycurgus, husband of Georgina

Cooper Lycurgus, and Nicholas Lycurgus, single, as joint tenants.

5. That the just compensation for the taking of the subject property is in the sum of $1.20 per square foot for Lot 3A, which is 182,691 and amounts to $219,229.20, and $1.00 for the total area of Lot 3B, which is 48,787 square feet, and both of which areas are part of Lot 3, Land Court Application 1814, Owner's Certificate of Title No. 86867, 5.314 acres, and so the total just compensation awarded is $219,230.20.

IT IS THEREFORE ORDERED that counsel for Plaintiff will submit an appropriate judgment in accordance herewith.

DATED: Hilo, Hawaii, Dec. 16, 1971.

/s/ NELSON K. DOI
Judge of the above-entitled Court

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT
STATE OF HAWAII

Civ. No. 2260

JUDGMENT

Pursuant to the Findings of Fact and Conclusions of Law filed herein,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That the public use to be served by the condemnation of Lot 3, Land Court Application 1814, as shown on Map 1, Owner's Certificate of Title No. 86867, Transfer Certificate of Title No. 131,700, 5.314 acres is the expansion of the Kaimu Black Sand Beach Park, at Kalapana, Puna, County and State of Hawaii.

2. That the Plaintiff shall take all of Lot 3, Land Court Application 1814, Owner's Certificate of Title No. 86867, Transfer Certificate of Title No. 131,700, 5.314 acres, in fee

simple absolute, together with all improvements and appurtenances thereunto belonging.

3. That the just compensation for the taking of Lot 3, Land Court Application 1814, with all improvements and appurtenances thereunto belonging is the sum of Two Hundred Nineteen Thousand Two Hundred Thirty and 20/100 Dollars ($219,230.20).

4. That the distribution of the sum awarded in paragraph 3, above, as just compensation shall be made by the Chief Clerk of this Court, to the following persons in the following amounts, subject, however, to Sections 101-36 and 101-37, HRS 1968, as amended:

Joseph Yuki Sotomura, husband of Grace Fumiye Sotomura	$109,615.10
Yamada Estate, a general partnership, whose partners are: Robert Mitsugi Yamada, Emma Lacha Yamada (husband and wife) and Donald Kalaniopuu Yamada, whose wife is Ermardine Kuulaimomi Yamada	$109,615.10.

5. That upon showing to this Court that the amount awarded in paragraph 3, above, as just compensation has been deposited with the Chief Clerk of this Court, Final Order of Condemnation of Lot 3, Land Court Application 1814, may be entered herein.

Dated: Hilo, Hawaii, Jan 5 1972

/s/ Nelson K. Doi
Judge

Attest:

/s/ Terry Kaide
Clerk, Third Circuit Court

SUPREME COURT OF HAWAII—I

Syllabus

COUNTY OF HAWAII, a municipal corporation, Plaintiff-Appellee, *v.* JOSEPH YUKI SOTOMURA, GRACE FUMIYE SOTOMURA; et al., Defendants-Appellants

NO. 5281

APPEAL FROM THIRD CIRCUIT COURT
HONORABLE NELSON K. DOI, JUDGE

DECEMBER 11, 1973

RICHARDSON, C.J., MARUMOTO, ABE, LEVINSON AND KOBAYASHI, JJ.

RECORDS — *registration of titles to land — incidents of ownership*

Registered ocean front property is subject to the same burdens and incidents as unregistered land, including erosion.

SAME — *surveys — location of seaward boundaries.*

The determination of the Land court that the seaward boundary of a parcel of registered land is to be located along the high water mark remains conclusive; however, the precise location of the high water mark on the ground is subject to change and may always be altered by erosion.

EMINENT DOMAIN — *erosion to registered land*

A circuit court in eminent domain proceedings may determine questions of erosion to registered land without referring the matter to the land court.

BOUNDARIES — *boundaries seaward by statute — public policy.*

Public policy favors extending to public use and ownership as much of Hawaii's shoreline as is reasonably possible.

SAME — *same — upper reaches of the wash of waves.*

Where the wash of the waves is marked by both a debris line and a vegetation line living (other than kiawe), the presumption is that the upper reaches of the wash of waves over the course of a year lies along the line marking the edge of vegetation growth.

NAVIGABLE WATERS — *littoral rights — erosion*

When the sea gradually and imperceptibly encroaches upon the land, the loss falls upon the littoral owner, and land thus lost by erosion returns to the ownership of the state.

SAME — *lands under water — ownership in general*

Land below the high water mark is a natural resource owned by the state subject to, but in some sense in trust for, the enjoyment of certain public rights.

EMINENT DOMAIN — *compensation — measure and amount — consideration of conjunctive use.*

A trial court may properly consider the most profitable use of a parcel in conjunction with other lands in determining just compensation, if such use is reasonably probable at the time of taking.

OPINION OF THE COURT BY RICHARDSON, C. J.

This case arises as an appeal from eminent domain proceedings initiated by plaintiff-appellee County of Hawaii on July 7, 1970, in the acquisition of a park site at the Kalapana Black Sand Beach, a unique tourist attraction and surfing spot on the Island of Hawaii. Defendants-appellants contest the trial court's valuation of the subject property. At issue are the court's location of the seaward boundary of the subject property and the method of valuation.

The subject property, described by the County as "Lot 3, Land Court Application 1814," is a portion of a 62 acre parcel divided by defendants' predecessors in title into three lots. Lot 1 of Land Court Application 1814 is a 56 acre parcel mauka (inland) of the Puna Coast Road; Lot 2 is the Puna Coast Road running through the property, and Lot 3 is a long, narrow parcel of land bordered on one side by the Puna Coast Road and on the other by the sea. The seaward (makai) boundary of Lot 3 is described in the application as:

> . . . to a △ cut in pahoehoe at high water mark at seashore:
>
> Thence *following along the seashore in all its windings along high water mark*, the direct azimuths and distances between points at high water mark for the next four courses being:
>
> 12. 338° 50′ 30″ 538.24 feet to a spike;
> 13. 25° 17′ 411.24 feet to a spike;
> 14. 56° 05′ 610.84 feet to a spike;
> 15. 60° 44′ 340.38 feet to the point of beginning [a pipe] and containing an area of 5.314 acres (emphasis added).

Defendants first argue that the location of the seaward boundary as previously determined by the land court is conclusive; hence the trial court erred in finding that the boundary had moved further mauka due to erosion, and in dividing the property accordingly for purposes of valuation. Second, defendants contend that a valuation based on highest and best use should include consideration of the conjunctive use of the subject property with Lot 1, an

adjacent parcel under common ownership.

We reverse and remand for further proceedings in accordance with instructions set forth herein.

I

Defendants-appellants contend that the seaward boundary of Lot 3 is presumed to be at the same location today as it was when the property was registered in the land court in 1962. They argue that because land court proceedings are *res judicata* and conclusive against all persons as to the boundary determination, the certificate of registration shall be conclusive evidence of the location of the seaward boundary.[1]

The surveyor, who had prepared the survey for defendants' predecessors' application in 1959, testified at the jury-waived trial that he had located the high water mark along the limu line.[2]

The county disputed the location of the high water mark and the seaward boundary of Lot 3, arguing that erosion[3] to the subject parcel had occurred since the land court had

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[1] HRS § 501-71 provides in pertinent part:

Every decree of registration [shall bind the title, shall bind the land, and quiet the title thereto, subject only to the exceptions stated in section 501-82. It shall be conclusive upon and against all persons, including the State, ... The decree shall not be reopened by reason of the absence . . . of any person affected thereby, nor by any proceeding for reversing judgments or decrees . . . .

HRS § 501-88 provides that

Certificate as evidence. The original certificate in the registration book, any copy thereof duly certified under the signature of the registrar or assistant registrar, and the seal of the court, and also the owner's duplicate certificate, shall be received as evidence in all the courts of the State and shall be conclusive as to all matters contained therein, except as otherwise provided in this chapter.

[2] Defendants' surveyor testified:

Q Well, how did you attix the seaward boundary or the high-water mark boundary to this particular Lot 3, sir?

A Well, we more or less adopted the — we call it the limu line or the seaweed line. That's the growth of the limu along the shoreline and we followed that particular line as closely as possible and took measurements with a transit and a stadia rod to determine the meanderings of the shoreline.

[3] Erosion has been defined as "the gradual and imperceptible wearing away of land by the natural action of the elements." Bare Cove, Inc. v. Parsons, 206 N.Y. 319, 324, 99 N.E. 850, 852 (1912).

approved the survey. In 1969, prior to the initiation of this eminent domain proceeding, the county surveyor prepared a survey in which he located the seaward boundary pursuant to the decision of this court in *In re Application of Ashford*, 50 Haw. 314, 315, 440 P.2d 76, 77 (1968), that the seaward boundary between private upland and public beach is "along the upper reaches of the wash of waves, usually evidenced by the edge of vegetation or the line of debris . . . ." At trial, the county surveyor testified that to locate the boundary, he determined the upper reaches of the wash of waves to be along the debris line,[4] which was further mauka than the limu line.

Court was convened at the subject property on November 8, 1971, for the purpose of inspecting the limu line, the vegetation line, and the debris line. Following this inspection, the court found that Lot 3 had eroded so that the seaward boundary was now further inland than the high water mark shown on the land court application. Agreeing with the county surveyor, the court applied the *Ashford* definition to locate the new boundary along the debris line.[5] Before we reach the question of whether the trial court properly located the seaward boundary, we must first determine whether the court properly considered and found erosion.

---

[4] The county surveyor testified:

A Usually we look where the wash is, where the debris —

Q The debris?

A Yeah.

Q The wash of the waves?

A Yeah.

[5] Finding of Fact No. 6 states:

That there has been erosion along the seaward boundary so that the seaward boundary, according to *In re Application of Ashford*, 50 Haw. 314 (1968), would be further inland. The survey made by Mr. Kalo properly indicates the point at which the work of the elements, waves, winds, has taken its toll to erode the land — that following the *Ashford* case "the upper reaches of the wash of the waves as evidenced by the line of debris" would establish the metes and bounds description of the subject property remaining above the line established by the *Ashford* case, as . . . hereinafter referred to as Lot 3A. The acreage in Lot 3A is 4.194 or 182,691 square feet.

Although Rule 26, Rules of the Land Court provides for registration of title to accretion to previously registered land, neither HRS Chap. 501 Land Court Registration nor the Rules of the Land Court provide for registration of a change in the location of a seaward boundary which has been altered by erosion. We cannot assume that the silence of the statute or the rules is an expression of intent to foreclose the state or county from challenging the title to newly-eroded tidelands.

We hold that registered ocean front property is subject to the same burdens and incidents as unregistered land, including erosion. HRS § 501-31. Thus the determination of the land court that the seaward boundary of Lot 3 is to be located along high water mark remains conclusive; however, the precise location of the high water mark on the ground is subject to change and may always be altered by erosion.

This court recently rejected the position that the state cannot subsequently challenge title to registered land where the state later discovered that the seaward boundary was located further mauka than shown on the maps, and a portion of the property had become submerged by erosion. In *In re Application of Castle*, 54 Haw. 276, 277, 506 P.2d 1, 3 (1973), we permitted the state to dispute the location of a boundary similarly described as "at high water mark" on the map accompanying a certificate of title, because a recent survey prepared by the state showed that "the present seashore boundary of these lots are further mauka (inland) than the high water mark shown on this map."

Our holding in *Castle* permits a court to determine questions of erosion in whatever form they arise. The trial court in the instant case could have suggested that the boundary issue be litigated in the land court before deciding the issue of valuation. See *Re Land Title, State of Hawaii*, 49 Haw. 537, 544, 425 P.2d 83, 88, *rehearing denied*, 49 Haw. 575, 425 P.2d 83, 102 (1967). The trial court was under no compulsion to do so, however. We hold that the questions of erosion and boundary location were properly before the trial court and now are properly before this court for review.

The finding that erosion had occurred is a finding of fact that should not be "set aside unless clearly erroneous."[6] H.R.C.P., Rule 52(a). *Lowe v. Honolulu Rapid Transit*, 50 Haw. 582, 586, 445 P.2d 372, 376 (1968).

III

Having concluded that the trial court properly determined that the seaward boundary had been altered by erosion and the location of the high water mark has shifted, we now hold that the new location of the seaward boundary on the ground, as a matter of law, is to be determined by our decision in *In re Application of Ashford, supra*.

The *Ashford* decision was a judicial recognition of long-standing public use of Hawaii's beaches to an easily recognizable boundary that has ripened into a customary right. *Cf. State ex rel. Thornton v. Hay*, 254 Or. 584, 462 P.2d 671 (1969). Public policy, as interpreted by this court, favors extending to public use and ownership as much of Hawaii's shoreline as is reasonably possible.

The trial court correctly determined that the seaward boundary lies along "the upper reaches of the wash of waves." However the court erred in locating the boundary along the debris line, rather than along the vegetation line.

We hold as a matter of law that where the wash of the waves is marked by both a debris line and a vegetation line lying further mauka: the presumption is that the upper reaches of the wash of the waves over the course of a year lies along the line marking the edge of vegetation growth. The upper reaches of the wash of the waves at high tide during one season of the year may be further mauka than the upper reaches of the wash of the waves at high tide during the other seasons. Thus while the debris line may change from day to day or from season to season,[7] the vegetation line is a more

[6] We take judicial notice of the fact that the U.S. Army Corps of Engineers is currently planning to build a 1400 foot breakwater to prevent further erosion of the black sand beach at Kaimu.

[7] The county surveyor testified at trial:

Q So the debris line would remain the same day after day?

A No.

Q It changes, right?

A Correct.

permanent monument, its growth limited by the year's highest wash of the waves.

We remand this case and direct that the trial court locate and establish the seaward boundary of Lot 3 along the vegetation line as of the date of summons.

IV

The trial court divided Lot 3 into two parcels: Lot 3A, that portion of Lot 3 mauka of the *Ashford* seaward boundary line, with an area of 4.194 acres, and Lot 3B, that portion of Lot 3 makai of the *Ashford* seaward boundary line but mauka of the 1960 limu line, with an area of 1.120 acres. The trial court found that Lot 3B had no market value, but awarded defendants $1.00 as just compensation for the taking.[8] Defendants contend that the division into two separate parcels for valuation was erroneous and that the area of 5.314 acres remains unchanged; the county replies that because defendants did not object to these findings at trial, they may not do so on appeal. *Lindeman v. Raynor*, 43 Haw. 299 (1959).

We find neither argument persuasive, and we reverse this finding of the trial court. First, we reverse the calculation of the area of Lots 3A and 3B, because the location of the *Ashford* seaward boundary line was erroneous. Second, although we uphold the division of Lot 3 into two separate parcels, we reverse the award of $1.00 for land which does not belong to defendants.

> In *Halstead v. Gay*, 7 Haw. 587, 590 (1889), we held that
>
> . . . land now above high-water mark, which has been formed by imperceptible accretion against the shore line existing at the date of the survey and grant, has become attached by the law of accretion to the land described in the grant.

---

[8] Finding of Fact No. 7 states,

> The just compensation for the taking of a portion of the subject land below, makai, and seaward side of the Ashford seaward boundary, Lot 3B, and which amounts to 1.120 acres or 48,787 square feet is $1.00 of the total area. This Court finds and concludes that the area below the Ashford line has no market value, except for $1.00, and further because of the operation of the law in the Ashford case it has no value to the defendants.

We have never ruled on the question of whether title to land lost by erosion passes to the state. In the absence of kamaaina testimony or other evidence of Hawaiian custom relevant to the question, we resort to common law principles:

> The loss of lands by the permanent encroachment of the waters is one of the hazards incident to littoral or riparian ownership. . . . [W]hen the sea, lake or navigable stream gradually and imperceptibly encroaches upon the land, the loss falls upon the owner, and the land thus lost by erosion returns to the ownership of the state. *In re City of Buffalo*, 206 N.Y. 319, 325, 99 N.E. 850, 852 (1912).

We find another line of cases persuasive to determine this question. Land below the high water mark, like flowing water, is a natural resource owned by the state "subject to, but in some sense in trust for, the enjoyment of certain public rights." *Bishop v. Mahiko*, 35 Haw. 608, 647 (1940). The public trust doctrine, as this theory is commonly known, was adopted by this court in *King v. Oahu Railway & Land Co.*, 11 Haw. 717 (1899). In that case we adopted the reasoning of the United States Supreme Court in *Illinois Central R.R. v. Illinois*, 146 U.S. 387 (1892), holding that title to land below the high water mark was:

> . . . different in character from that which the state holds in lands intended for sale . . . . It is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties . . . . The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. *King v. Oahu Railway & Land Co.*, 11 Haw. at 723-24.

We hold that the land below the *Ashford* seaward boundary line as to be redetermined belongs to the State of Hawaii, and the defendants should not be compensated therefor.

The trial court valued Lot 3A, that portion of Lot 3 lying mauka of the Ashford seaward boundary line, at $1.20 per square foot, for a total of $219,229.20. The court based this valuation on evidence in the record supporting a finding that the property was best suited for public park purposes. The state land use commission had placed the parcel in the conservation district, and the county had zoned the property "open" and in its general plan designated Lot 3 for park development.

Defendants contend that Lot 3 must be valued at the "highest and best use" to which the property may reasonably be put. They urge that the "highest and best use" of Lot 3 would be in conjunction with use of Lot 1, property under common ownership lying mauka of the Puna Coast Road. That parcel, which the state land use commission has placed in the urban district, has been zoned R-5-A, residential-agriculture and designated for resort-hotel use in the general plan by the county. Defendants argue that since the proposed conjunctive use of the property was feasible, *i.e.*, by building the resort's swimming pool on Lot 3, the trial court should have given weight to this consideration in determining the fair market value of the property. Taking into consideration a use in conjunction with the mauka parcel for resort purposes, defendants' appraisers established a valuation of Lot 3 ranging between $2.24 and $4.00 per square foot.

We held that consideration of conjunctive use in valuation is proper in *City and County v. Collins*, 42 Haw. 199, 217-18 (1957), quoting with approval the opinion of Mr. Justice Butler in *Olson v. United States*, 292 U.S. 246, 255-56 (1934):

> Just compensation includes all elements of value that inhere in the property, but it does not exceed market value fairly determined. The sum required to be paid the owner does not depend upon the uses to which he has devoted his land but is to be arrived at upon just consideration of all the uses for which it is suitable. The highest and most profitable use for which the property is

adaptable and needed or likely to be needed in the reasonably near future is to be considered, not necessarily as the measure of value, but to the full extent that the prospect of demand for such use affects the market value while the property is privately held. The fact that the most profitable use of a parcel can be made only in combination with other lands does not necessarily exclude that use from consideration if the possibility of combination is reasonably sufficient to affect market value. Nor does the fact that it may be or is being acquired by eminent domain negative consideration of availability for use in the public service. (Citations omitted.)

The trial judge must determine whether it appears likely that conjunctive use of the subject parcel will occur in the reasonably near future:

> Elements affecting value that depend upon events or combinations of occurrences which, while within the realm of possibility, are not shown to be reasonably probable, should be excluded from consideration, for that would be to allow mere speculation and conjecture to become a guide for the ascertainment of value — a thing to be condemned in business transactions as well as in judicial ascertainment of truth. *Olson v. United States*, 292 U.S. 246, 257 (1934).

Under the above standard, the trial court properly excluded consideration of conjunctive use in considering just compensation. There is nothing in the record to support a conclusion that a market for the use proposed by the defendants was reasonably probable at the time of the taking.

The state and county governments have, for almost 15 years, designated the Kalapana-Kaimu community as a potential recreation-resort center. However, in the development plans admitted in evidence, the government agencies have proposed the acquisition of Lot 3 as a viewpoint and picnic facility.[9] Defendants' witness Robert Bush, who prepared a study of development feasibility for defendants in 1970, testified that the timing for a proposed resort

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[9] Belt, Collins & Assoc., *A Plan for the Metropolitan Area of Hilo* 52-55, 1961; County of Hawaii, *Kalapana-Kaimu Park Development Plans* (1969).

development was "delayed several years" at the time of trial.[10]

Although we reverse the award of $219,229.20 as based on an erroneous calculation of area, we find no error in the valuation of Lot 3 for park purposes at $1.20 per square foot. Absent a showing by defendants that a demand existed for the proposed use of Lot 3 in conjunction with the mauka parcel for resort purposes in the reasonably near future, we must sustain the trial court's rejection of defendants' plan as a factor in the determination of the fair market value of Lot 3.

VI

The decision of the trial court is reversed and remanded for a relocation of the seaward boundary of Lot 3 along the upper reaches of the wash of waves as evidenced by the vegetation line, and a recalculation of the area of the subject property. That portion of Lot 3 lying makai of the vegetation line is held to be the property of the state, and defendants are not entitled to compensation for the taking of this portion of the property. That portion of Lot 3 mauka of the vegetation line is to be valued at $1.20 per square foot as just compensation for the taking.

Charles B. Key (*Damon, Shigekane, Key & Char* of counsel) for defendants-appellants *Joseph Yuki Sotomura* and *Grace Tamaye Sotomura*.

Masanori Kushi for defendants-appellants *Robert Mitsugi Yamada*, et al.

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[10] Mr. Burke, for example, testified he could not build before July 7, 1970 because a hotel developer into proceeding with the same date construction of a project of this nature."

A Waikiki at the time we were completing these studies, it was my understanding that there were several developers interested in talking with the owners. I think at that time it was possible at that time to enter into some kind of a development agreement [illegible] that the development would be delayed several years before it could be built. But that the development could be delayed several years [illegible] that the property could be held for speculation as an investment [illegible] Kalapana.

Richard T. Ishida, Special Counsel, and *Clifford H. F. Lum*, Corporation Counsel, for County of Hawaii, plaintiff-appellee.

CONCURRING AND DISSENTING OPINION OF MAEDA, J.

I concur in the holding in Part V of the foregoing opinion of the court sustaining the determination of the circuit court that, for the purpose of arriving at the amount of just compensation to be paid in this case, Lot 3 had a value of $1.20 per square foot.

I also concur in the holding in Part IV of the opinion that the circuit court erred in awarding even a nominal amount to defendants for the portion of the area lying between the seaward boundary described in the land court decree and the line to which the seaward boundary moved inland by erosion inasmuch as such area became the property of the State when erosion took place.

In Part II of the opinion, it is stated: "We hold that registered ocean front property is subject to the same burdens and incidents as unregistered land, including erosion. HRS § 501-81. Thus the determination of the land court that the seaward boundary of Lot 3 is to be located along high water mark remains conclusive; however, the precise location of the high water mark on the ground is subject to change and may always be altered by erosion."

I concur in that holding, subject to the following caveat: The wording of the holding is ambiguous because there is an ambiguity in the statement "the determination of the land court that the seaward boundary of Lot 3 is to be located along high water mark remains conclusive." In the land court decree in this case, the seaward boundary was not described generally as being along the high water mark but was specifically located by metes and bounds. Thus, I read the holding to mean that the seaward boundary specifically delineated in the decree remained conclusive, until a change in the line was established by proof of erosion.

My concurrence in the holding does not mean that I consider a final land court decree of registration of oceanside

land not to be res judicata with respect to the delineation therein of the seaward boundary of the land.

A land court decree which has not been appealed and has therefore become final, is res judicata.

In every land court decree, HRS § 501-81 is impliedly incorporated as a part thereof. HRS § 501-81 provides: "Registered land, and ownership therein, shall in all respects be subject to the same burdens and incidents which attach by law to unregistered land." Accretion and erosion are incidents which attach by law to unregistered land.

Thus, in the case of a land court decree, the doctrine of res judicata applies to the decree with the provision of HRS § 501-81 read into it by implication.

I think that, from the res judicata nature of a land court decree as stated above, where the seaward boundary of the registered land is described in the decree, the boundary must be presumed to remain along the described line, until a subsequent change is established by proof of accretion or erosion, the burden of proof of accretion being on the landowner and the burden of proof of erosion being on the State.

Turning now to dissent, I dissent from the holding in Part III of the opinion that "*as a matter of law* . . . where the wash of the waves is marked by both a debris line and a vegetation line lying further mauka, the presumption is that the upper reaches of the wash of the waves over the course of a year lies along the line marking the edge of vegetation growth," and that the seaward boundary of Lot 3 be established along the vegetation line. (Emphasis supplied)

In so dissenting, I will not indulge in an extensive dissertation against the holding, for to do so will be but an exercise in futility. I merely point out that, in my opinion, the holding is plain judicial law-making. That is apparent from the quoted statement in the opinion that the holding is being made "as a matter of law," and from the following reason given therefor: "*Public policy, as interpreted by this court*, favors extending to public use and ownership as much of Hawaii's shoreline as is reasonably possible." (Emphasis supplied)

In connection with such judicial law-making, I quote the following statement of Dean Roscoe Pound, which deserves more than a passing notice:

> "It must be remembered that any attempt to set up new premises on a large scale by judicial lawmaking unduly impairs the stability of the legal and so of the economic order, since judicial lawmaking is retroactive whereas normally legislation prescribes for the future." II Pound, Jurisprudence 453 (1959).

App. 22

No. 5281

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1971

COUNTY OF HAWAII, a municipal corporation,
Plaintiff-Appellee,

v.

JOSEPH YUKI SOTOMURA; GRACE FUMIYE SOTOMURA; ROBERT MITSUGI YAMADA, EMMA LAEHA YAMADA, DONALD KALANIOPUU YAMADA, members of YAMADA ESTATES, a duly registered general partnership in the State of Hawaii; and ERMARDINE KUULAIMOMI YAMADA,
Defendants-Appellants

and

LEO GEORGE LYCURGUS; GEORGINA COOPER LYCURGUS and NICHOLAS LYCURGUS,
Defendants

Civil No. 2260

Appeal from the Judgment, Filed January 5, 1972

Third Circuit Court

Honorable NELSON K. DOI, Judge

PETITION FOR REHEARING

Defendants-Appellants in this cause petition the Court for a rehearing pursuant to Rule 5 of this Court on the grounds that (I) by its judgment and instruction to the trial court, the Court has deprived Defendants of their constitutional rights to just compensation and to due process of law, (II) the Court was without jurisdiction to adjudicate the relocation of the seaward boundary of

Defendants' land according to a new method imposed *sua sponte*, and (III) the Court overlooked the argument of Defendants based upon the principle of res judicata.

I. THIS COURT'S JUDGMENT AND INSTRUCTIONS TO THE TRIAL COURT DEPRIVE DEFENDANTS OF CONSTITUTIONAL RIGHTS.

A. *Use of novel methods to relocate the seaward boundary of Defendants' land effected a taking of Defendants' property without just compensation in violation of Defendants' rights secured by the Fifth and Fourteenth Amendments to the Constitution of the United States and by Article I, Section 18 of the Constitution of the State of Hawaii.*

By its opinion the Supreme Court has held that Defendants have lost beachfront land in two ways. First, Defendants have lost land by erosion, as the trial court found. Defendants do not dispute the Supreme Court's holding that land lost by erosion becomes the property of the State. Second, Defendants have lost land by the Supreme Court's change of the legal definition of the high water mark. By virtue of this change in boundary criteria made *sua sponte* by the Supreme Court, Defendants have been deprived of their property without just compensation. The decision by the Court respecting the new boundary criteria effects a condemnation of land for public use for which no compensation is awarded. This decision unquestionably constitutes state action. *Shelley* v. *Kraemer*, 334 U.S. 1 (1948).

There was undisputed testimony in this case that the means used in the Land Court proceedings for locating the seaward boundary of the land, and at the time constituting the accepted practice of the Land Court and of government and private surveyors, was by following the line of growing seaweed found on the shore. No other evidence on this point was offered, nor did Plaintiff at any time dispute that use of the seaweed line was the method employed to locate

the seaward boundary of the land when title to that land was registered in the Land Court. The undisputed evidence also established that, at the time of taking and time of trial, the general location of the seaward boundary of the land, established through use of the seaweed line, was seaward of both of the upper reaches of the wash of the waves as evidenced by the line of debris (used by the trial court as the seaward boundary of Defendants' land) and the line of vegetation announced by this Court to be the seaward boundary of Defendants' land. See, particularly, Defendants' Exhibit 3. It is obvious, therefore, that, in adopting a method of locating the seaward boundary different from the method established in the adjudication of title, the trial court deprived Defendants of a substantial area of property lying between the seaward line at the time of taking and debris line at the same date. The exact amount lost cannot be determined because Defendants were not afforded an opportunity, after the trial court ruled the seaward boundary was changed by erosion, to prove the exact location of the new seaweed line.

This Court accomplished an additional taking of Defendants' property in ruling that the line of vegetation marks the new seaward boundary, following erosion, because the line of vegetation is inland of the debris line adopted by the trial court. This Court also expressly ruled that all of Defendants' land seaward of the vegetation line is the property of the State and that Defendants are not entitled to be compensated for its loss. The loss occurred, however, not from erosion by natural forces, but by judicial erosion—through the adoption of novel criteria as the means of locating the seaward boundary of the land.

B. *Adjudication of Defendants' entitlement to compensation upon grounds of public policy, rather than upon evidence and applicable law, deprived Defendants of due process of law guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and by Article 1, Section 4 of the Constitution of the State of Hawaii.*

Prior to issuance of its opinion in this case, no Hawaii Court had decided that a seaward boundary of property registered in the Land Court, described by metes and bounds, was subject to relocation upon the occurrence of natural erosion of the land. When the trial court decided to relocate the seaward boundary by use of the debris line, and again when this Court decided to re-relocate that boundary by use of the vegetation line, Defendants did not have, and will not under this Court's judgment be permitted to have, any opportunity to present evidence on what facts and circumstances should be considered by the Court in locating the new seaward boundary of the property after the occurrence of natural erosion. Indeed, Defendants' efforts to protect their ownership and to obtain just compensation for the taking of their property are wholly frustrated by the non-evidentiary procedure followed by the trial court and by this Court. Both courts decided, solely on the basis of policy and not on the basis of evidence or any statute or any judicially formulated and previously announced law applicable to Land Court registered property, that novel methods for relocating the seaward boundary of the property should be applied.

Whenever a party is to be deprived of property, he is entitled to a meaningful hearing *before* the fact. *Fuentes* v. *Shevin*, 407 U.S. 67 (1973); *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673 (1930). Defendants in this case have not had a hearing on the issue of the proper criteria for determining the location of the seaward boundaries of their property. If Defendants are to be deprived

of property, by judicial reconstruction of boundaries, they are entitled to be heard. Defendants, surprised by the Supreme Court's ruling, have no remedy available to them.

The method that this Court ruled must be used is one which has never before been suggested, is a method not contended for, even by Plaintiff, was formulated by this Court wholly *sua sponte*, and assumes facts on which no evidence was offered. In the trial court there was neither argument, evidence or admission to support this Court's assumptions that there has been long standing public use of Hawaii's beaches to an easily recognizable boundary, that the wash of the waves over the course of a year or any other period is marked by the vegetation line, or that the growth of vegetation is limited by the year's highest wash of the waves. Notwithstanding, the trial court is now directed by the judgment of this Court to use this unique new method to determine the amount of land owned by Defendants, to which a unit value is then to be applied in assessing the amount of compensation to be paid to Defendants.

Procedural due process requires that Defendants be given an opportunity to be heard on the method to be used in relocating the seaward boundary of their property following a decision that the seaward boundary is subject to dislocation by erosion. Arbitrary judicial selection of innovative criteria dictating the new locations of the boundary and imposition of those criteria upon Defendants' land constitute a denial of due process. *Fuentes* v. *Shevin*, 407 U.S. 67 (1973). Absent the opportunity to present evidence and urge reasons why the method originally used to locate the seaward boundary should continue to be used and the methods adopted by the trial court and by this Court should not be used, Defendants are without a remedy to protect their rights and property. Due process requires that a remedy be afforded. *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673 (1930).

II. THIS COURT IS WITHOUT JURISDICTION TO RULE THAT THE SEAWARD BOUNDARY OF DEFENDANTS' LAND IS TO BE LOCATED BY A METHOD SUGGESTED *SUA SPONTE* BY THIS COURT.

Section 602-5 Hawaii Revised Statutes gives this Court jurisdiction, on appeal, only of questions of law, or mixed law and fact, properly brought before it on appeal. The question whether use of the vegetation line is a proper method of relocating the seaward boundary of Defendants' land was not raised by the trial court's judgment, by the appeal, or by any argument presented in this Court.

The method of relocating Defendants' seaward boundary is a material point, determinative of the amount of compensation to be paid to Defendants. Section 602-13, Hawaii Revised Statutes, prohibits this Court from deciding a proposition material to the decision which has not been raised or argued by counsel on either side until both have had an opportunity of arguing the point before the Court. This Court has no legal authority to use the appeal of this case as a vehicle to impose upon property owners, as law, its views of current proper social policy.

III. THE OPINION IGNORED THE ARGUMENT THAT THE METHOD OF FIXING THE LOCATION OF THE SEAWARD BOUNDARY IS RES JUDICATA.

Defendants argued below and in this Court that the location of the seaward boundary, described by metes and bounds, was fixed by the Land Court decree and was not subject to relocation upon the occurrence of erosion to the land. Upon this point, for the first time, this Court ruled that title to registered land is subject to loss by erosion. Defendants accept that ruling. Defendants also argued that the method of locating the seaward boundary, also was fixed by the Land Court decree. That is, in Land Court

Application No. 1814, not only the actual location of the seaward boundary of Defendants' land, but also the means of locating that seaward boundary, were adjudicated. The State and County governments were parties to that proceeding and are bound by that adjudication. While the location of the seaward boundary may change, upon the occurrence of accretion to or erosion of Defendants' land, the means of locating that boundary was fixed by the decree of the Land Court and was not open to revision either by the Circuit Court or by this Court. If the seaward boundary is to be relocated because of erosion, the principle of res judicata mandates use of the same method by the Land Court in determining its new location. This Court, in adopting a new method without commenting or ruling upon the principle of res judicata, apparently overlooked that argument.

DATED: Honolulu, Hawaii, December 21, 1973.

Respectfully submitted,

/s/ CHARLES W. KEY
Charles W. Key
Attorney for Defendants

Of Counsel:

DAMON, SHIGEKANE, KEY & CHAR

IN THE SUPREME COURT OF HAWAII

OCTOBER TERM 1973

No. 5281

PETITION FOR REHEARING

December 28, 1973

RICHARDSON, C. J., MARUMOTO, ABE, LEVINSON and KOBAYASHI, J. J.

Per Curiam The petition for rehearing filed herein is hereby denied.

Justice Marumoto, who dissented from the majority opinion of the court, does not concur.

/s/ WILLIAM S. RICHARDSON

/s/ KAZUHISA ABE

/s/ BERNARD H. LEVINSON

/s/ BERT T. KOBAYASHI

Charles W. Key (Damon Shigekane Key & Char, of counsel) for the petition

App. 30

No. 5281

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1973

COUNTY OF HAWAII, a municipal corporation,
Plaintiff-Appellee,

v.

JOSEPH YUKI SOTOMURA; GRACE FUMIYE SOTOMURA; ROBERT MITSUGI YAMADA, EMMA LAEHA YAMADA, DONALD KALANIOPUU YAMADA, members of YAMADA ESTATES, a duly registered general partnership in the State of Hawaii; and ERMARDINE KUULAIMOMI YAMADA,
Defendants-Appellants

and

LEO GEORGE LYCURGUS; GEORGINA COOPER LYCURGUS and NICHOLAS LYCURGUS,
Defendants

Civil No. 2260

Appeal from the Judgment, Filed January 5, 1972

Third Circuit Court

Honorable NELSON K. DOI, Judge

JUDGMENT ON APPEAL

Pursuant to the opinion of the Supreme Court of the State of Hawaii filed December 11, 1973, the judgment of the lower court is reversed and remanded for a relocation of the seaward boundary of Lot 3 along the upper reaches of the wash of waves as evidenced by the vegetation line,

and a recalculation of the area of the subject property in accordance with said opinion.

DATED: Honolulu, Hawaii, January 7, 1974.

BY THE COURT

/s/ CLEMENT J. H. CHUN
Clerk

APPROVED:

/s/ WILLIAM S. RICHARDSON
Chief Justice

(SEAL)

No. 5281

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1973

NOTICE OF JUDGMENT ON APPEAL

TO: THE HONORABLE PRESIDING JUDGE OF THE CIRCUIT COURT OF THE THIRD CIRCUIT, STATE OF HAWAII:

PLEASE TAKE NOTICE that the Supreme Court of the State of Hawaii has entered the following judgment on appeal:

Pursuant to the opinion of the Supreme Court of the State of Hawaii filed December 11, 1973, the judgment of the lower court is reversed and remanded for a relocation of the seaward boundary of Lot 3 along the upper reaches of the wash of waves as evidenced by the vegetation line, and a recalculation of the area of the subject property in accordance with said opinion.

DATED: Honolulu, Hawaii, January 7, 1974.

BY THE COURT

/s/ CLEMENT J. H. CHUN
Clerk

The form of the foregoing notice is hereby approved and IT IS ORDERED that the same issue forthwith.

DATED: Honolulu, Hawaii, January 7, 1974.

/s/ WILLIAM S. RICHARDSON
Chief Justice

(SEAL)

HAWAII REVISED STATUTES

§501-1 Court; jurisdiction; proceedings; location; rules, practice, etc. A court is established, called the land court, which shall have exclusive original jurisdiction of all applications for the registration of title to land and easements or rights in land held and possessed in fee simple within the State, with power to hear and determine all questions arising upon such applications, and also have jurisdiction over such other questions as may come before it under this chapter, subject to the rights of appeal under this chapter. The proceedings upon the applications shall be proceedings in rem against the land, and the decrees shall operate directly on the land and vest and establish title thereto.

The court shall hold its sittings in Honolulu, but may adjourn from time to time to such other places as the public convenience may require.

The court shall have jurisdiction throughout the State, and shall always be open, except on Saturdays, Sundays, and holidays established by law.

It is a court of record, and shall cause to be made a seal, and to be sealed therewith all orders, process, and papers made by or proceeding from the court and requiring a seal. All notices, orders, and process of the court may run into any judicial circuit and be returnable as the court may direct.

The procedure shall conform as near as may be to the practice in the circuit courts, but subject to the express provisions of this chapter and to general laws and rules of court. Forms prescribed by the court before taking effect shall be approved by the supreme court.

In this chapter, except where the context requires a different construction, the word "court" means the land court. [L 1903, c 56, §2; am L 1913, c 21, §1; am L 1921, c 208, §1; RL 1925, §3191; RL 1935, §5000; RL 1945, §12600; RL 1955, §342-1; HRS §501-1; am L 1972, c 91, §1(a),(b)]

§501-28 Plans and muniments. The applicant shall file with the application a plan of the land, and all original muniments of title within his control mentioned in the schedule of documents. Such original muniments as affect land not included in the application may be withdrawn on filing certified copies of the same. When an application is dismissed or discontinued the applicant may, with the consent of the court, withdraw the original muniments of title. The applicant shall also file with the application a complete abstract of title of the land upon forms furnished by the court and in accordance with the rules of court. [L 1903, c 56, §26; am L 1915, c 62, §1; RL 1925, §3215; RL 1935, §5019; RL 1945, §12619; RL 1955, §342-20; HRS §501-28; am L 1972, c 91, §1(f)]

§501-45 Answer intervention; surveyor to be heard when. Any person claiming an interest, whether named in the notice or not, may appear and file an answer on or before the return day, or within such further time as may be allowed by the court. The answer shall state all objections to the application; shall set forth the interest claimed by the party filing the same; and shall be signed and sworn to by him or by some person in his behalf. The department of accounting and general services or the county surveyor may appear in any case and be heard upon the facts pertaining to the accuracy of the location or survey, according to the rules of court. [L 1903, c 56, §34; RL 1925, §3223; RL 1935, §5028; RL 1945, §12628; RL 1955, §342-29; am L Sp 1959 2d, c 1, §12; HRS §501-45; am L 1972, c 91, §1(i)]

§501-51 Reference to other judges or to master; maps, reference; subdivision; costs; etc. If in any case an appearance is entered and answer filed, the cause shall be set down for hearing on the motion of either party, but an order of default shall first be entered against all persons who do not appear and answer, as provided in section 501-46. If the land is located in any circuit without the island of Oahu the court may refer the cause or any part thereof including presiding at return days referred to in sections 501-41, 501-42, 501-46) to the judge presiding in the circuit in which the land is located as part of his calendar duties as judge to make record of appearances, grant continuances and to record defaults, or to hear the parties and their evidence, and make report thereof to the court. The report of the judge to whom such reference is made has the same weight as that of a master appointed in a matter within the jurisdiction of a circuit court as set forth in sections 603-21.6, 603-21.7, and 635-14, and the judge of the land court shall proceed thereon to ratify, affirm, or modify the decision or orders performed under such reference as is proper on the record. The reference may be revoked or modified at any time.

The court, before granting a decree, shall require a map of the land in question to be filed. The map may be required to show all data necessary to enable the lines thereon to be reproduced upon the ground. The map shall also contain, or be accompanied by, such data (as survey lines or field notes) from enduring monuments, that the destruction of temporary monuments will not render it impracticable to enforce a decree based upon the map.

The court shall require that the names, as far as known, of all occupants and owners of adjoining lands and the names, as far as known, of all occupants of the land, other than tenants of the applicant, shall be placed on the map, and that all parcels of land owned by parties, other than the applicant, situate within the exterior boundaries of applicant's land shall be marked on the ground and their boundaries defined by metes and bounds together with such easements or rights of way as may be in existence on the ground.

Distances and functions of necessary angles must be shown definitely, not approximately. The court may order durable bounds to be set and referred to in the application or amendment; may require additional field surveys to be made either by the department of accounting and general services or by a competent surveyor in private practice; and may issue such additional instructions in regard to surveys as it deems proper or as are called for by the rules of court. The expenses of survey and bounds shall be taxed in the costs of the case and may be apportioned among the parties, as justice may require. If no persons appear to oppose the application, such expenses shall be borne by the applicant.

The court may waive in its discretion any part or all of the requirements hereof, when it deems that the interests of justice and equity require such waiver.

The map may be referred by the court to the department of accounting and general services, which shall cause the same to be verified, making such practical check with ground monuments as to verify its accuracy, and a proper report of its findings made to the court; provided, that in all cases where the State is an applicant for a registered title or in any other way directly interested in any application for a registered title, as indicated by the examiner's report thereon, the court shall refer the map to a competent surveyor in private practice who shall cause the same to be verified, making such practical check with ground monuments as to verify its accuracy and a proper report of his findings to the court. After a decree has been issued in favor of the State, and the land therein described has been subdivided, the certificate of the department certifying to the correctness of the map, showing the subdivision, shall be competent for all purposes of the subdivision.

Any errors on the map filed with the application for registration or in the survey on the ground of any property proposed to be registered or already registered in the land court, which may be found by checking as provided in this section shall be corrected by and at the expense of the surveyor firm, partnership, or individual surveyor or surveyors that performed the survey for the owner. [L 1903, c 56, §36; am L 1913, c 21, §1; am L 1915, c 162, §1; RL 1925, s 3225; am L 1927, c 152, §1; am L 1933, c 23, §1; RL 1925, §5030; am L 1941, c 30, §1; RL 1945, §12630; am L 1949, c 394, §1; RL 1955, §342-31; am L Sp 1959 2d, c 1 §12; HRS §501-51; am L 1972, c 91, §1(j),(k)]

§501-71 Decree of registration; conditional when; quieting title, exceptions; reopened when. If the court after hearing finds that the applicant, at the time of filing his application, or subsequently, had title, as stated in his application, that his title is proper for registration, and that since filing his application the title of the applicant has not been encumbered in any manner, then a decree of confirmation and registration as prayed for shall be entered.

If the court finds that the applicant, at the time of filing his application, or subsequently, had title, as stated in his application, that his title is proper for registration, and that subsequent to the filing of his application, the title has been encumbered, then the title shall be registered subject to the encumbrances so found.

If the court finds that the applicant, at the time of filing application, or subsequently, had title, as stated in his application, that his title is proper for registration, and that subsequent to filing his application the applicant has conveyed away all or any portion or portions of the premises or interest therein sought to be registered, then a decree of confirmation and registration shall be entered, covering the entire premises, confirming title in the applicant and the person or persons deriving their title through the applicant, to the premises or interest in accordance with his or their respective true ownership of the whole or any portion or portions thereof or interest therein at the time of filing the decree, and subject to all encumbrances affecting all or any portion thereof.

Every decree of registration of absolute title shall bind the land, and quiet the title thereto, subject only to the exceptions stated in section 501-82. It shall be conclusive upon and against all persons, including the State, whether mentioned by name in the application, notice, or citation, or included in the general description "to all whom it may concern." The decree shall not be opened by reason of the absence, infancy, or other disability of any person affected thereby, nor by any proceeding for reversing judgments or decrees; subject, to the right of any person deprived of land or of any estate or interest therein by a decree of registration obtained by fraud to file a petition for review within one year after the entry of the decree; provided no innocent purchaser for value has acquired an interest. If there is any such purchaser the decree of registration shall not be opened but shall remain in full force and effect forever, subject only to the right of appeal hereinbefore provided. Any person aggrieved by the decree in any case may pursue his remedy by action of tort against the applicant or any other person for fraud, in procuring the decree. [L 1903, c 56, pt of §38; RL 1925, pt of §3228, am L 1927, c 258, §7; RL 1935, pt of §5037; RL 1945, pt of §12637; RL 1955, pt of §342-38]

§501-74 Decree, contents of. Every decree of registration shall bear the date of the year, day, hour, and minute of its entry, and shall be signed by the registrar. It shall state whether the owner is married or unmarried, and if married the full name of the husband or wife. If the owner (or spouse of the owner) has been known by more than one name, all the names of such person shall be stated. The wife's maiden name and surname shall be stated in all cases. If the owner is under disability it shall state the nature of the disability, and if a minor, shall state his age. It shall contain a description of the land as finally determined by the court; and shall set forth the estate of the owner, and also, in such manner as to show their relative priority, all particular estates, mortgages, easements, liens, attachments, and other encumbrances including rights of husband or wife, if any, to which the land or the owner's estate is subject; and may contain any other matter properly to be determined in pursuance of this chapter. The decree shall be stated in a convenient form for transcription upon the certificates of title hereinafter mentioned. [L 1903, c 56, §40; RL 1925, §3230; RL 1935, §5038; RL 1945, §12638; RL 1955, §342-39]

§501-75 Transcription of decree in registry: certificate of title. Immediately upon the entry of the decree of registration the registrar shall send a certified copy thereof, under the seal of the court, to the assistant registrar in the bureau of conveyances, who shall transcribe the decree in a book to be called the registration book, in which a leaf or leaves in consecutive order shall be devoted exclusively to each title. The entry made by the assistant registrar in this book in each case shall be the original certificate of title, and shall be signed by him and sealed with the seal of the court. All certificates of title shall be numbered consecutively, beginning with number one. The assistant registrar shall in each case make an exact duplicate of the original certificate, including the seal, but putting on it the words "owner's duplicate certificate," and deliver the same to the owner or to his attorney duly authorized.

In case of a variance between the owner's duplicate certificate and the original certificate the original shall prevail. The certified copy of the decree of registration shall be filed and numbered by the assistant registrar with a reference noted on it to the place of record of the original certificate of title. When several parcels of land which are not contiguous have been registered under one application as permitted by section 501-25, the decree of registration shall expressly state that the assistant registrar, after entering the decree in the registration book, may cancel the original certificate of title and issue in place thereof a separate transfer certificate of title for each parcel so registered. [L 1903, c 56, §41; RL 1925, §3231; am L 1931, c 242, §1; RL 1935, §5039; RL 1945, §12639; RL 1955, §342-40; HRS §501-75, am L 1972, c 91, §1(o)]

§501-81 Legal incidents of registered land. Registered land, and ownership therein, shall in all respects be subject to the same burdens and incidents which attach by law to unregistered land. Nothing in this chapter shall in any way be construed to relieve registered land or the owners thereof from any rights incident to the relation of husband and wife, or from liability to attachment or mesne process or levy on execution, or from liability to any lien of any description established by law on land and the buildings thereon, or in the interest of the owner in land or buildings, or to change the laws of descent except as provided in section 501-71, or the rights of partition between coparceners and other cotenants, or the right to take the same by eminent domain, or to relieve such land from liability to be recovered by a trustee in bankruptcy under the provisions of law relating to preferences, or to change or affect in any way any other rights or liabilities created by law and applicable to unregistered land, except as otherwise expressly provided in this chapter. [L 1903, c 56, §70; RL 1925, §3259; RL 1935, §5040; RL 1945, §12640; RL 1955, §342-41; HRS §501-81; am L 1972, c 91, §1(p)]

§501-85 Substitution, one certificate for several, several for one; subdivisions, maps. A registered owner holding one duplicate certificate for several distinct parcels of land may surrender it, with the approval of the court, and receive separate certificates for portions thereof. A registered owner holding separate duplicate certificates for two or more distinct parcels of land, which are contiguous, or which are so adjacent (although separated by a roadway or stream or other strip of land) as to form one lot of land for practical use, may surrender the certificates, and, with like approval and by a decree of the court, receive a single original and duplicate certificate for the whole, or separate certificates for subdivisions thereof, issued in place of the surrendered certificates; provided, that if any person or persons other than the registered owner appear to have an interest in any part of the premises proposed to be consolidated, or in any intervening roadway, stream, or strip of land as aforesaid, the court shall not entertain the application for consolidation unless the other person or persons join with the owner in the application, signing and acknowledging the same in the same manner as provided for original applications, or unless the person or persons if not joining in the application have been given notice thereof and an opportunity to be heard as shall be ordered by the court.

Any owner proposing to combine two or more parcels of land, or to subdivide any registered land, shall file with the court an application therefor, together with a map or plan showing the proposed combination or subdivision and accurately delineating thereon all boundaries, streets, passage ways, and other easements connected therewith. The court, before approving the same, and authorizing the issuance of any new certificate or certificates thereon, shall cause the same to be verified by the department of accounting and general services and be satisfied that the same are accurately represented, and that the applicant has complied with the laws and regulations covering subdivisions in the county concerned, applicable thereto. [L 1903, c 56, §44; am L 1923, c 196, §1; RL 1925, §3234; RL 1935, §5044; am L 1939, c 242, §10; RL 1945, §12644; am L 1949, c 222, s 13; am L 1951, c 271, §3; RL 1955, §342-45; am L Sp 1959 2d, c 1, §12; HRS §501-85; am L 1972, c 91, §1(e)]

§501-87 No adverse possession or prescription. No title, right, or interest in, to, or across registered land in derogation of that of the registered owner shall be acquired by prescription or adverse possession; provided, that this section shall not prejudice any adverse claim, as against any person registered as first owner of land with a possessory title only, in respect of length of possession of any other person, who was in possession of the land at the time when the registration of the first owner took place.

Land registered pursuant to this chapter is not subject to surrender under section 264-1. [L 1903, c 56, §46; am L 1921, c 135, §1; RL 1925, §3236; RL 1935, §5046; RL 1945, §12646; am L 1949, c 64, §1; RL 1955, §342-47]

§501-88 Certificate as evidence. The original certificate in the registration book, any copy thereof duly certified under the signature of the registrar or assistant registrar, and the seal of the court, and also the owner's duplicate certificate, shall be received as evidence in all the courts of the State and shall be conclusive as to all matters contained therein, except as otherwise provided in this chapter. [L 1903, c 56, §47; RL 1925, §3237; RL 1935, §5047; RL 1945, §12647; RL 1955, §342-48]

§ 501-186 Registration of adverse claims; notice; hearing; costs. Whoever claims any right or interest in registered land adverse to the registered owner arising subsequent to the date of original registration may, if no other provision is made in this chapter for registering the same, make a statement in writing setting forth fully his alleged right or interest, and how or under whom acquired, and a reference to the volume and page of the certificate of title of the registered owner, and a description of the land in which the right or interest is claimed. The statements shall be signed and sworn to, and shall state the adverse claimant's residence, and designate a place at which all notices may be served upon him. This statement is entitled to registration as an adverse claim, and the court, upon the petition of any party in interest, may require an approved bond to be filed for the payment of double costs if so taxed, and shall grant a speedy hearing upon the question of the validity of the adverse claim, and shall enter such decree thereon as justice and equity may require. If the claim is adjudged to be invalid or the bond is not filed, the registration shall be canceled. If in any case the court, after notice and hearing, finds that the claim thus registered was frivolous or vexatious, it may tax the adverse claimant double costs. [L 1903, c 56, §106; RL 1925, §3296; RL 1935, §5094; RL 1945, §12694; RL 1955, §342-94]

§501-82 Tenure of holder of certificate of title. Every applicant receiving a certificate of title in pursuance of a decree of registration, and every subsequent purchaser of registered land who takes a certificate of title for value and in good faith, hold the same free from all encumbrances except those noted on the certificate in the order of priority of recordation, and any of the following encumbrances which may be subsisting, namely:

(1) Liens, claims, or rights arising or existing under the laws or Constitution of the United States, which the statutes of this State cannot require to appear of record in the registry; provided, that notices of liens for internal revenue taxes payable to the United States, and certificates affecting such liens, shall be deemed to fall within this subsection only if the same are recorded in the bureau of conveyances as provided by chapter 505.

(2) Unpaid real property taxes assessed against the land and improvements covered by the certificate of title, with interest, penalties, and other additions to the tax, which, unless a notice is filed and registered as provided by section 246-55, shall be for the period of three years from and after the date on which the lien attached, and if proceedings for the enforcement or foreclosure of the tax lien are brought within the period, until the termination of the proceedings or the completion of the tax sale.

(3) Any public highway, or any private way laid out under the provisions of law, when the certificate of title does not state that the boundary of such way has been determined.

(4) Any lease, coupled with occupancy, for a term not exceeding one year; provided, that the priority of the unrecorded lease shall attach only at the date of the commencement of the unrecorded lease and expire one year from the date or sooner if so expressed.

(5) Any liability to assessments for betterments, or statutory liability which may attach to land as a lien prior to or independent of, the recording or registering of any paper of the possibility of a lien for labor or material furnished in the improvement of the land; provided, that the priority of any such liability and the lien therefor (other than for labor and material furnished in the improvement of the land which shall be governed by section 507-43) shall cease and terminate three years after the liability first accrues unless notice thereof, signed by the officer charged with collection of such assessments or liability, setting forth the amount claimed, the date of accrual, and the land affected, is registered and noted on the certificate of title within such three year period; provided, further, that if there are easements or other rights, appurtenant to a parcel of registered land which for any reason have failed to be registered, such easements or rights shall remain so appurtenant notwithstanding such failure, and shall be held to pass with the land until cut off or extinguished by the registration of the servient estate, or in any other manner.

(6) The possibility of reversal or vacation of the decree of registration upon appeal. [L 1903, c 56, §39; am L 1909, c 139, §1; RL 1925, §3229; am imp L 1925, c 192, §14; am L 1931, c 222, §1; am imp L 1932 2d, c 140, §65; RL 1935, §5041; RL 1945, §12641; am L 1945, c 255, §1; am L 1949, c 144, §1; RL 1955, §342-42; HRS §501-82; am L 1972, c 91, §1(q),(r); am L 1973, c 128, §3]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1486

JOSEPH YUKI SOTOMURA and
GRACE FUMIYE SOTOMURA,

Petitioners,

v.

COUNTY OF HAWAII, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF HAWAII

BRIEF FOR RESPONDENT COUNTY OF HAWAII IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1486

JOSEPH YUKI SOTOMURA and
GRACE FUMIYE SOTOMURA,

Petitioners,

v.

COUNTY OF HAWAII, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF HAWAII

BRIEF FOR RESPONDENT COUNTY OF HAWAII IN OPPOSITION

Respondent COUNTY OF HAWAII ("Respondent") prays that the Petition for Writ of Certiorari to the Supreme Court of the State of Hawaii by Petitioners Joseph Yuki Sotomura and Grace Fumiye Sotomura in this cause be denied.

OPINION BELOW

The opinion of the Supreme Court of the State of Hawaii ("the court below") is appended to the Petition for a Writ of Certiorari. (Petition's App. 8) The opinion was delivered on December 11, 1973, and the Petition for Rehearing denied on December 28, 1973. (Petition's App. 29)

JURISDICTION

Respondent questions the jurisdiction as set forth in the Petition for the reason that there is no final judgment as required under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Whether the court below's Judgment on Appeal issued on January 7, 1974 remanding the case to the Court of the Third Circuit, State of Hawaii ("the trial court") for a relocation of the seaward boundary of Lot 3 along the upper reaches of the wash of waves as evidenced by the vegetation line meets the requirement of finality of judgment imposed by 28 U.S.C. §1257(3).

2. Whether the establishment by the court below of a seaward boundary line in a condemnation case in conformance to an earlier court below's decision constituted a taking of property without just compensation.

3. Whether the court below by failing to give res judicata effect to the Land Court Decree resulted in a denial of due process of law.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States:

Amendment V

"No person shall . . . be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation."

Amendment X

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Amendment XIV, Section 1

"No state shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

Hawaii Revised Statutes ("HRS") Chapter 501, Land Court Registration, sections 501-1, 501-28, 501-45, 501-51, 501-63, 501-71, 501-74, 501-75, 501-81, 501-82, 501-85, 501-87, 501-88, 501-186, Vol. 7 at pages 4-41, and Vol. 7 (Supp. 1973) at pages 2-10. Each section is reproduced in full in the Appendix to the Petition, (Petition's App. 33-38), except for section 501-63 which is reproduced in Respondent's Appendix (App. 1).

STATEMENT OF THE CASE

Petitioners' statement of the case is substantially correct and Respondent accepts said statement except those portions inconsistent with the statement hereinafter stated.

The Land Court Decree of Registration and Owner's Certificate of Title described the seaward boundary of the subject land. There were no findings of fact that siad boundary was fixed with approval of the state surveyor nor in accordance with established practice nor the location of high-water mark was *fixed* along the seaward line.[1]

The Defendant's memoranda referred to on page 5 of the Petition did not argue that the decree of registration issued by the Land Court was res judicata as to the means of locating high-water mark as the boundary, but instead argued that the high-water mark as described in the said decree of registration was conclusive and not subject to change.[2]

The ruling of the court below was not unpredictable and the rule of law applied in the instant case was the same as that used by the Land Court, i.e., to determine the high-water mark to ascertain the seaward boundary of ocean front land.[3]

ARGUMENT

I.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THIS COURT LACKS JURISDICTION TO HEAR THE CASE.

The decision of the court below is not final. 28 U.S.C. §1257, states:

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[1] Relating to statement on pages 4 and 5 of Petition.

[2] Relating to statement on page 5 of Petition.

[3] Relating to statement on page 7 of Petition.

"*Final* judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * *

"(3) By writ of certiorari. . . ." (emphasis added)

The jurisdiction of the United States Supreme Court is limited to *final* judgments or decrees rendered by the highest court in the state in which a decision could be had. The finality requirement has been imposed since the Judiciary Act of 1789, §25, 1 Stat. 73, 85, and is designed to avoid the evils of piecemeal review. *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 68 S. Ct. 972, 92 L.Ed. 1212 (1948). Furthermore, it is founded upon "consideration generally applicable to good judicial administration." *Radio Station WOW Inc. v. Johnson*, 326 U.S. 120, 124, 65 S. Ct. 1475, 1478, 89 L.Ed. 2092 (1945).

The decision by the Hawaii Supreme Court in this case is not final and unlike the decision in *Radio Station WOW Inc. v. Johnson, supra*, the purpose for which the case has been remanded to the trial court may raise additional federal issues. The Hawaii Supreme Court remanded the case to the judge of the trial court to determine the boundary along the vegetation line.[4] As recognized by the petitioners, the property involved in the eminent domain action is subject to erosion. It has been some four years since the date of summons, and, therefore, the establishment of the vegetational line could hardly be referred to as ministerial but rather requiring the testimony of surveyors and individuals who knew of the existence of the line in 1970. Therefore, the location of the vegetation line requires a finding of fact by the trial court which may raise

[4] Judgment on Appeal, Petition's App. 30.

federal issues which this court may again be asked to determine.

In *Republic Natural Gas Co. v. Oklahoma, supra,* the Oklahoma Supreme Court sustained the order of the State Corporation Commission, directing the appellant to take gas ratably from another producer in the same field. This court dismissed the appeal for want of a final jurisdiction, holding:

> "... On the other, in an eminent domain case, as in a case like this, the fate of the whole litigation may well be affected by the fate of the unresolved contingencies of the litigation ... Another similarity between this case and the condemnation cases calls for abstention until what is organically one litigation has been concluded in the state. It is that the matters left open may generate additional federal questions." *Republic Natural Gas Co. v. Oklahoma, supra,* at 71.

This court has earlier established the standard to be applied in determining the finality of the judgment. "And it frequently has been said that for a judgment of an appellate court to be final and reviewable for this purpose it must end the litigation by fully determining the rights of the parties, so that nothing remains to be done by the trial court except the ministerial act of entering the judgment which the appellate court ... directed." *Department of Banking v. Pink,* 317 U.S. 264, 267, 63 S. Ct. 233, 87 L.Ed. 254 (1942). This court went on to hold that the test today is whether the order of the appellate court has in fact fully adjudicated the rights and that the adjudication is not subject to further review by a state court.

The application of the standard enunciated by this court to the factual situation of the case at bar leaves no alternative but to deny jurisdiction. The litigation has not been ended since the trial court must determine the location of the vegetation line subject to appeal and

review by the court below. If this court grants the Petition for the Writ of Certiorari, it may again be asked to review the court below's decision on the location of the vegetation line. The fragmented appeal is precisely the apprehension that the justices of this court expressed in *Republic Natural Gas Co. v. Oklahoma, supra.*

Because there remains more to be done by the trial court than the ministerial act of entering the judgment of the court below, because the decision of the court below has not in fact fully adjudicated the rights of the parties, because the judgment of the trial court is again subject to review by the court below, and because the matters left open may generate additional federal questions, a final judgment has not yet been rendered and, therefore, this Honorable Court has no jurisdiction over the case.

II.

ESTABLISHMENT BY THE COURT BELOW OF A SEAWARD BOUNDARY LINE DOES NOT CONSTITUTE A TAKING OF PROPERTY WITHOUT DUE PROCESS.

A. Property rights governed by state law.

The Tenth Amendment to the United States Constitution states:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

It is well established that as a matter of a general proposition that the law of real property is, under our

Constitution, left to the individual states to develop and administer. *Sunderland v. U.S.*, 266 U.S. 226, 45 S. Ct. 64, 69 L.Ed. 259 (1924). Likewise, property rights as to title to riparian[5] lands within each state's borders are left to the respective states. *Bonelli Cattle Company v. Arizona*, 94 S. Ct. 517, 523 (1973). The Court in *Arkansas v. Tennessee*, 246 U.S. 158, 38 S. Ct. 301, 62 L.Ed. 638 (1917), stated:

> "... it is for the State to establish for themselves such rules of property as they deem expedient with respect to the navigable waters within their borders and the riparian land adjacent to them...." (*Ibid.* 246 U.S. at 176, 38 S. Ct. at 305.)

The general proposition is only subject to regulations pertaining to the navigability of navigable waters and to rights accrued from federal patents granted prior to the entrance of the state into the Union. *Hughes v. State of Washington*, 389 U.S. 290, 88 S. Ct. 438, 19 L.Ed.2d 530 (1967); *Bonelli Cattle Company v. Arizona, supra.* However, these cases, although holding that questions of ownership of land conveyed by the United States prior to statehood was governed by federal law, recognize, by the very essence of carving an exception, that normally the laws of real property are governed by the laws of the state within which the property is located.[6]

In the case of *Barney v. Keokuk*, 94 U.S. 324, 24 L.Ed. 224 (1876), this court held and accepted on the issue of the applicability of state law to title of riparian proprietors on the banks of the Mississippi that the local law was to govern the case. In that case, similar to the case at bar, the state law held that title of riparian

[5] Riparian and littoral are used interchangeably herein.

[6] Conflict of laws is not a problem here as the question was never raised in the court below.

owner extends only to the high water mark and that the area between the high and low water mark, as well as the bed of the river, belongs to the state.

The subject riparian land in the instant case was never owned and conveyed by the federal government prior to Hawaii being admitted into the Union, therefore, the laws of the State of Hawaii shall determine what rights apply to the subject riparian land.

B. Seaward boundary line of riparian land is governed by the rule stated in In Re Application of Ashford[7] and application of said rule does not constitute a taking of petitioners' property.

Prior to 1968, the Hawaii Supreme Court had no occasion to rule on the issue regarding the location of the seaward boundary line of riparian lands situated within the borders of said state. Its first opportunity came in the case of *In Re Application of Ashford*, 50 Haw. 314, 440 P.2d 76 (1968).

In that case, the makai[8] boundary or boundary located next to the sea was described in the royal patent as running "ma ke kai."[9] The Hawaii Supreme Court decided that ma ke kai is along the *upper reaches of the wash of waves*, usually *evidenced by the edge of vegetation or by the line of debris.*

The *Ashford* case finally determined the rule of law to be applied in locating the "high water mark" which becomes the seaward boundary of riparian land between the State and the private landowner.[10]

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[7] 50 Haw. 314 (1968).

[8] Hawaiian term meaning towards the ocean.

[9] Literally translated meaning along the sea.

[10] The court below's opinion, Petition's App. page 13.

In the case at bar, the seaward boundary is described as ". . . . along the seashore in all its windings *along high water mark*. . . ."[11] (emphasis added) The court below determined according to state law that high water mark is the same as the upper reaches of the wash of waves as described in *Ashford, supra.* Clarifying the rule announced in *Ashford,* the court below recognized that where the high water mark is evidenced by both a debris and vegetation line, the upper reaches of the waves is located at the vegetation line since it may be further inland during one season than during other seasons. It further recognized that whereas the debris line may fluctuate from day to day, the vegetation line is a more permanent monument, since the vegetational growth is limited by the year's highest wash of the waves.[12] Hence, the court below merely clarified the established real property law in the State of Hawaii by applying a previous decision to the facts of this case.

Petitioners allege that the court below's decision effectually confiscated their property without just compensation. Petitioners argue that prior to the court below's decision in the instant case, the "rule of law" in the State of Hawaii concerning seaward boundaries of riparian land within said sate had been clearly defined by established practice. Petitioners cite as authorities, opinions of the Attorney General of Hawaii prior to statehood and actions and decisions by the State of Hawaii's Land Court, over which the court below has appellate jurisdiction.[13]

The court below, having such appellate jurisdiction, is not bound by the Land Court's rulings. The court

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[11]The court below's opinion, Petition's App. 9.

[12]*Ibid,* Petition's App. 13.

[13]Section 501-63, Hawaii Revised Statutes.

below, being the State's court of last resort, has the final authority in the pronouncement of the rule of law applicable to any situation. *Calaf v. Gonzales*, 127 F.2d 934 (1st Cir. 1942).

Petitioners urge that language in the cases of *Hughes v. Washington*, *supra*, and *Bonelli Cattle Co. v. Arizona*, *supra*, support their contention that application of *Ashford* resulted in a confiscatory taking of their property. The facts of both cases are significantly different from those of the instant case. In both, the riparian land in question was originally owned by the federal government for which a land patent was issued to a private owner. Said property was soon included within the borders of the state. The question arose as to the ownership of lands accreted to the original land patent after the respective states declared that all accreted lands belong to the state. It should be noted that the federal common law recognized that accreted lands belonged to the riparian land owner, and consequently, this Court ruled that federal common law applied and the respective states could not take those lands without just compensation.

The instant case presents a clearly different situation. No federal land patent is involved and federal common law is not applicable, and consequently, as discussed earlier, state law will govern the situation.

Because the Hawaii law relating to the establishment of boundaries of littoral landowners has been expressed with sufficient clarity by a line of decisions, this court is bound to recognize the asserted state law. *Erie R. Co. v. Tompkins*, 304 U.S. 64, L. Ed. 1188, 58 S. Ct. 817 (1938). Furthermore, since the enunciated law of the State of Hawaii is and has always been that the boundary of littoral owners was a meandering line established by the *high water mark* and the Supreme Court of Hawaii merely defined the high water mark, there was no taking involved.

C. Petitioners have not been denied the opportunity to be heard.

Petitioners contend that the boundary line along the sea should be that of the limu line[14] (seaweed line) as allegedly applied by the Land Court. This position was clearly argued by Petitioners in the trial court.[15] Likewise, the Respondent argued that the *Ashford* line should be applied, i.e., debris line. Petitioners did not consent nor agree to Respondent's position. Instead, Petitioners argued vehemently against Respondent's contention that the *Ashford* standard should be applied.

The court below rejected Petitioners' position nor did it accept Respondent's position completely. The court below applied the *Ashford* standard using the vegetation line. As stated in *Ashford:*

> "... along the upper reaches of the wash of waves, usually evidenced by the *edge of vegetation* or by the line of debris left by the wash of waves, ..." (emphasis added) (*Supra* at 315)

The court below did not raise any new issue and Petitioners had the opportunity to argue against the application of *Ashford.* The basic issue before the court below was whether the standard as pronounced in *Ashford* is to be applied to registered land, a portion of which has been subject to erosion. Clearly, this issue was argued by the Petitioners and Respondent, and having had that opportunity, Petitioners cannot now complain.

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[14] See, Petition, page 5, footnote 6.

[15] Rec. Doc. 10.

III.

THE DOCTRINE OF RES JUDICATA DOES NOT PRECLUDE APPLICATION OF THE ASHFORD RULE.

The doctrine of res judicata is a matter of state law, resting largely within the discretion of the court.[16] In the absence of an indication of any purpose on the part of a state to evade a prior decision of the Supreme Court of the United States in a state litigation, principles of finality protecting the parties to the litigation are, within the broad limits of fundamental fairness, solely the concern of state law. *Konigsberg v. State Bar of California*, 366 U.S. 36, 44, 81 S. Ct. 997, 1003, 6 L.Ed.2d 105 (1961).

The court below did not reject the application of res judicata to the Land Court decree, however, said court recognizing the effect of res judicata declared that a registered land is subject to the same burdens and incidents as unregistered land, including erosion.[17] The court below further stated that the precise location of the high-water mark on the ground is subject to change.[18]

Petitioners appear to allege that the Land Court decree conclusively determined the procedure that must be used when the seaward boundary of registered land is subsequently altered by erosion. Respondent is not in accord with this position.

The Land Court decree describing the seaward boundary of the litigated parcel states:

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[16]This not contested by Petitioners as stated in the Petition, page 16.

[17]The court below's opinion, Petition, App. 12. This position is also not contested by Petitioners. Petition, page 7, footnote 14.

[18]*Ibid*, Petition, App. 12.

"... to a Δ cut in pahoehoe at *high water mark* at seashore:

Thence following along the seashore in all its windings along *high water mark*, the direct azimuths and distances between points at *high water mark* for the next four courses being:

12. 338° 50' 30" 538.24 feet to a spike;

13. 25° 17" 411.24 feet to a spike;

14. 56° 05' 610.84 feet to a spike;

15. 60° 44' 340.38 feet to the point of beginning [a pipe] and containing an area of 5.314 acres."
(emphasis added)

It is significant to note that the basic reference point is the "high water mark." Thus, the Land Court determined that the seaward boundary should be measured by looking to the high water mark, although said court did not define what it meant by the high water mark. At the time of its decision, there was nothing definitive in Hawaii law that defined where the seashore boundary was.

Obviously, riparian land along the ocean is continually subject to wave action, which continually alters the affected riparian land. The Land Court decree affecting the subject parcel recognized this fact by determining the seaward boundary with reference to the "high water mark." The decree does not state the method used to determine the high water mark. The effect of said decree was to determine the title to the subject parcel bordered by the "high-water mark" and no more, which title is not in dispute. Consequently, it is difficult to recognize the applicability of res judicata as Petitioners argue.

Furthermore, the doctrine of res judicata does not apply to questions of law. *United States v. Moser*, 266

U.S. 236, 45 S. Ct. 66, 69 L. Ed. 262 (1924). The rule pronounced in *Ashford* and applied in this case raises only questions of law, and any fact, question or right distinctly adjudged in the Land Court decree in this case is not in dispute.

Respondent further contends that a substantial change in the facts precludes the application of res judicata. Erosion completely eradicated any seaward boundary line which existed when the Land Court decree was granted. With erosion, a new boundary line had to be established by the trial court in the instant case. Consequently, the factual finding of the seaward boundary as established by the Land Court decree, having now been eroded, is no longer applicable, and a fact previously adjudged is not in dispute.

CONCLUSION

Petitioners allege that constitutional questions raised by their petition are of immediate and critical importance. However, 28 U.S.C. §1257(3) requires a final judgement be rendered before a Writ of Certiorari be granted. Such final judgment has not yet been rendered.

Should this Court find that such finality has been met, the petition should still be denied since no substantial pre-existing right enjoyed by Petitioners has

been confiscated by the court below's action in this case.

Accordingly, Respondent respectfully submits that the Writ of Certiorari should be denied.

Respectfully submitted.

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APPENDIX

HAWAII REVISED STATUTES

§501-63 *Appeal to supreme court.* In all cases an appeal to the supreme court shall lie from the final decree of the land court on behalf of any party aggrieved by the decree. The record on appeal may include the proceedings had in the circuit court, if any, as well as those had in the land court.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1486

JOSEPH YUKI SOTOMURA and
GRACE FUMIYE SOTOMURA, *Petitioners,*

v.

COUNTY OF HAWAII, ET AL., *Respondents.*

On Petition for a Writ of Certiorari to the Supreme Court of Hawaii

---

REPLY MEMORANDUM FOR PETITIONERS

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REPLY MEMORANDUM FOR PETITIONERS

Respondent County of Hawaii's Brief in Opposition to the Petition urges denial of the Petition on grounds that the judgment below was not final, the case merely involves local property law within the exclusive province of the State, and location of a seaward boundary subject to movement by erosion cannot be res judicata.

A. The Judgment Below Was Final.

The judgment of the court below was:

> "Pursuant to the opinion of the Supreme Court of the State of Hawaii filed December 11, 1973, the judgment of the lower court is reversed and remanded for a relocation of the seaward boundary of Lot 3 along the upper reaches of the wash of waves as evidenced by the vegetation line, and a recalculation of the area of the subject property in accordance with said opinion." (App. 30-31)

The relocation of the boundary at the vegetation line is merely ministerial because the vegetation line was surveyed (Rec. Doc. 20, p. 141) just before the trial.[1] The map (Rec. Doc. 34) showing the location of that line was introduced in evidence without objection (Rec. Doc. 20, p. 140). The recalculation of the area of the property, using the surveyed vegetation line as the seaward boundary, is mere mathematics.

Respondent states that fixing the location of the vegetation line may raise federal issues for this court to determine, but does not suggest how such issues might be raised or what they might be. Petitioners submit that the federal questions were created when the court below dictated that the trial court should employ a novel method for relocating their seaward boundary. That edict fully adjudicated the rights of

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[1] The trial judge's determination of the fact of erosion, relied upon to justify relocation of the seaward boundary, was made by observation at the time of trial. There was no testimony or other evidence that any erosion had occurred before the date of summons. The County surveyor's map (Rec. Doc. 32) showing a new seaward boundary by survey done on May 13, 1970 (Rec. Doc. 20, pp. 7-9) was merely a relocation of the seaward boundary through adoption of a new monument, the debris line, as the criterion for locating the seaward boundary.

the parties and nothing now remains but for the trial court to give it effect. Unlike *Republic Natural Gas Co.* v. *Oklahoma,* 334 U.S. 62 (1948), cited by Respondent, this case does not involve any requirement that the parties come to an agreement concerning their respective rights or obligations, failing which there shall be further hearings below and determinations of those rights and obligations, all of which might give rise to additional federal questions. The trial court is powerless to do anything other than mechanically to carry out the mandate of the lower court.

B. The State's Reserved Power To Establish Rules of Property Must Be Exercised in a Manner Consistent With the Constitution.

Petitioners concede that real property law, generally, is for the State to formulate. It is unquestionably state law that has, until the ruling of the court below, created and protected that right in property which Petitioners, and owners of hundreds of miles of Hawaii shoreline property, have now lost. No more through its courts than through its executive departments or legislature, however, can a State constitutionally deprive an owner of vested property rights without both just compensation and an opportunity to be heard with regard to the taking. In this instance, land to which Petitioners held registered title was appropriated to the State through the simple expedient of redefining the term "high-water mark". By that device the court below substituted a new monument, the vegetation line, for the adjudicated monument, the seaweed line, as the monument controlling the location of Petitioners' seaward boundary.

Petitioners' title to land extending to and along "highwater mark" was registered in the State's

Torrens title system in 1962. Notwithstanding Respondent's assertion to the contrary (Brief For Respondent, p. 14), there was definitive Hawaii law, extant at that time concerning the meaning of "high-water mark". An opinion of the Attorney General of Hawaii of 30 years standing, never withdrawn, disputed or distinguished by any subsequent opinion, instructed the Territorial Surveyor that this monument was to be located by reference to the *tides,* without regard to the effect of *wind or waves,* because it meant either "mean high watermark" or "the limit reached by the neap tides, unaffected by wind or waves".[2]

This meaning of high-water mark, established by ordinary high tide elevations, was adopted by the Land Court in at least two cases in which the government contended the location of an applicant's seaward boundary should be established by reference to some other monument. One of these was *In Re Application of Cass,* No. 1225 in the Land Court of the Territory of Hawaii. In that case the Land Court judge held, in 1940, that a wall constructed by applicant upland from the neap tide average or the mean high tide, but probably below the line of the wash of the highest wave or the highest spring tide level, was situated on applicant's land rather than upon the government-owned shore. In the other case, decided in 1963, the government contended that the seaward limit of accretion to registered land should be either the line of vegetation or the line

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[2] Opinions of the Attorney General of Hawaii, No. 1589, September 1. 1932. The opening and concluding paragraphs of this opinion, which was gospel to Hawaii surveyors until announcement of other considerations by *In Re Application of Ashford,* 50 Haw. 314, 440 P.2d 76 (1968), are attached as Appendix 2 to this Reply Memorandum.

of debris on the shore. The Land Court judge ruled that high-water mark, to which the applicant's title extended, was the line of elevation of mean high water. *In Re Application of Castle,* No. 616 (Dowsett petition to register accretion) in the Land Court of the State of Hawaii. At the time of registration of Petitioners' title in the Land Court, there were no contrary decisions in contested cases and it was settled law in the Land Court that boundaries along high-water mark were measured along the line of mean high tide. Petitioners' boundary was established in conformance with that law, using the seaweed line, at or just above the elevation of mean high tide, as the high-water mark (Rec. Doc. 20, pp. 126-133, 154).

Respondents urge (Brief For Respondent, p. 11) that this Court is bound to recognize asserted state law, relating to establishment of littoral boundaries, expressed with clarity by a line of decisions. However, only one decision is cited: *In Re Application of Ashford,* 50 Haw. 314, 440 P.2d 76 (1968). As noted in the Petition, *Ashford* involved land having a boundary "ma ke kai," with respect to which neither the meaning nor location had been determined between the owner and the State. On the other hand, in the case at bar, the monument marking the limit of Petitioners' land had been determined in litigation between Petitioners' predecessors and the State eight years prior to the condemnation action. The fact that the boundary may move, as the monument by which it is ascertained moves, neither makes it less certain, nor equates it with the previously undefined monument "ma ke kai" considered in *Ashford.* The mobility of the monument affords no justification, either, for the court below, *sua*

sponte, to tie Petitioners' seaward line to another monument without awarding compensation for the property taken and without permitting Petitioners to be heard with respect to the taking. It was only compensation, not title, that was in issue on the appeal to the court below.

C. Petitioners Were Unfairly Denied the Benefit of Prior Adjudication.

The monument marking the limit of Petitioners' land was required to be, and was, identified and located in the title registration proceedings. It was required not only by the governing statutes (Sec. 501-51 and 501-74, H.R.S., App. 34 and 35), but also by the circumstance that determination of title to a particular tract necessarily involves ascertainment of its boundaries. *Oklahoma* v. *Texas,* 256 U.S. 70 (1920). The monument identified in this case was high-water mark and it was located along the seaweed line, approximating the line of mean high water. These were determinations of fact. In a subsequent action between the State and the owner, the State would be bound by the identification of high-water mark as the seaward monument and by the means adopted for locating it. If the State could not itself escape the effect of the registration decree, certainly fundamental fairness should preclude the lower court from gratuitously declaring some of Petitioners' property to be State-owned through the artifice of declaring the location of Petitioners' high-water mark monument now to be a matter of law.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

CLINTON R. ASHFORD

Attorney for Petitioners

APPENDIX 2

September 1, 1932.

OPINION No. 1589.

BOUNDARIES; HIGH WATER MARK:

In locating the boundary of land granted "to the sea", "to high water" or "to high water mark", the common law prevails and fixes that boundary at "ordinary high water mark", which in turn has been variously held to be at "mean" or "medium" high water mark and "the limit reached by the neap tides". The latter is probably controlling, although for all practical purposes they are substantially identical in these waters.

Honorable Robert D. King,
Territorial Surveyor,
Honolulu, T. H.

Sir:

In your letter of June 16 you request the opinion of this Department as to what should be considered the controlling boundary of private property granted by the government and by description running to the "sea", "seashore", "high water", "high water mark", etc. You state that the practice of your Department has always been to consider that the controlling high water mark extends as far landward as the tide flows.

Clearly grants to the "sea" in this jurisdiction are analogous to and coterminous with grants to "high water mark". The only question is as to what constitutes the high water mark which is controlling in grants of this sort.

* * * * *

I find nothing to indicate that "the common law of England, as ascertained by English and American decisions", and as applicable to this question in Hawaii, has been displaced by Hawaiian judicial precedent or Hawaiian usage.

The common law applicable to this point has been ascertained by English and American decisions to be that the controlling boundary of land granted "to the sea" or "to high water mark", is either "mean high watermark", or "the limit reached by the neap tides, unaffected by wind or waves". This definitely eliminates from consideration "the uppermost reaches of the tide", "the point as far landward as the tide flows", the equinoctial and spring tides and the effect of wind or waves.

The later decisions, in which a more precise and technical consideration is given to the various types of tides, would seem controlling as placing high water mark at "the limit reached by the neap tides", although it is possible that the court, should it ever be confronted with the necessity of drawing a fine distinction between this point and "mean high water", would adhere to the latter.

Should a contest ever arise, and the local court be called upon to decide definitely as to which standard is controlling, viz., mean high water or the limit reached by the neap tides, I feel that the court would probably adopt the latter, and that where you have precise records of observations enabling you so to do, it would be preferable for you also to adopt this standard.

However, in view of the substantial identity of the two, I feel that, in the absence of precise data as to the limit reached by the neap tides, you would be safe in adopting mean high water, which data you would usually have, and that in so doing, neither the interests of the government nor of private parties would be appreciably jeopardized.

Respectfully,

H. R. Hewitt,
Attorney General.